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No. 01-____

IN THE

Supreme Court of the United States

JERRY GOETZ,
d/b/a Jerry Goetz and Sons

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; Anne Veneman, Secretary of the U.S. Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant, vacate, and remand the Tenth Circuit's decision sustaining an administrative collection action for assessments under the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* (the Beef Act) where petitioner's First Amendment challenge to the collection proceeding formed the basis of the split identified by the government in *United States* v. *United Foods, Inc.*, -- U.S. --, 121 S. Ct. 2334 (2001), which struck down assessments under the virtually identical Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* (the Mushroom Act)?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner-appellant below, and petitioner in this Court, is Jerry Goetz.

The respondents-appellees in the District of Kansas and in the Tenth Circuit, and respondents in this Court, are United States Department of Agriculture; Anne Veneman (succeeding Dan Glickman), Secretary of the U.S. Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 3
STATUTES AND REGULATIONS INVOLVED 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 7

I. THIS CASE SHOULD BE REEVALUATED BY THE TENTH CIRCUIT IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED FOODS*. 7

II. THE BEEF ACT IS MATERIALLY INDISTINGUISHABLE FROM THE MUSHROOM ACT AND CANNOT SURVIVE A FIRST AMENDMENT CHALLENGE UNDER THE STANDARDS ARTICULATED IN *UNITED FOODS*. 11

III. VACATUR AND REMAND SERVE THE EQUITIES OF THE CASE AND FURTHER THE ORDERLY AND EFFICIENT ADMINISTRATION OF JUSTICE. 15

CONCLUSION 15

TABLE OF AUTHORITIES

Pages

Cases

Glickman v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) 5, 8, 9, 13

Goetz v. *Glickman*, 149 F.3d 1131 (CA10 1998) (*Goetz I*), *cert. denied*, 525 U.S. 1102 (1999) 2

Goetz v. *Glickman*, 920 F. Supp. 1123 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (CA10 1998), *cert. denied*, 525 U.S. 1002 (1999) 2

Goetz v. *United States*, 99 F. Supp.2d 1308 (D. Kan. 2000), *aff'd*, -- F.3d -- (CA10 2001) (Table) 2

Goetz v. *USDA*, -- F.3d --, 2001 WL 401594 (CA10 2001) (unpub.) (*Goetz II*) 2

In re Jerry Goetz, 56 Agric. Dec. 1470, 1997 WL 730378 (USDA 1997) 2

In re Jerry Goetz, 57 Agric. Dec. 426, 1998 WL 174654 (USDA 1998) 2

Spradling v. *City of Tulsa*, 198 F.3d 1219 (CA10 2000) 10

United States v. *Frame*, 885 F.2d 1119 (CA3 1989), *cert. denied*, 493 U.S. 1094 (1990) 4, 13

United States v. *United Foods, Inc.*, -- U.S. --, 121 S. Ct. 2334 (2001) ..... passim

Statutes

7 U.S.C. § 192 14
7 U.S.C. § 2901 ..... 3, 12
7 U.S.C. § 2903 3
7 U.S.C. § 2904 ..... 3, 12
7 U.S.C. § 6101 12
28 U.S.C. § 1254 3

Regulations

7 C.F.R. Part 1209 12
7 C.F.R. Part 1260 ..... 3, 12
7 C.F.R. § 1260.172 3
7 C.F.R. § 1260.310 3
7 C.F.R. § 1260.311 3
7 C.F.R. § 1260.312 3

Other Authorities

Brief for Petitioner, *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184, 1995 U.S. Briefs (Lexis) 1184 (July 29, 1996) 9

Brief for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Jan. 24, 2001) 8, 12, 13

Petition for Writ of Certiorari, *United States* v. *United Foods, Inc.*, No. 00-276 (Aug. 18, 2000) 11, 12

Reply Brief (Cert.) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (November 3, 2000) 12

Reply Brief (Merits) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Apr. 9, 2001) 9

IN THE

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JERRY GOETZ,
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Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; Anne Veneman, Secretary of the U.S. Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Jerry Goetz respectfully petitions for a writ of certiorari to vacate and remand the judgment of the United States Court of Appeals for the Tenth Circuit for reconsideration in light of this Court's June 25, 2001 decision in *United States* v. *United Foods, Inc.*, -- U.S. --, 121 S. Ct. 2334 (2001).

OPINIONS BELOW

This case began with an administrative complaint against petitioner Goetz, filed by the Acting Administrator of the Agricultural Marketing Service of the United States Department of Agriculture. The complaint was stayed pending a chal-

lenge to the proceeding in the District Court for the District of Kansas. That challenge was rejected by the district court, the Tenth Circuit affirmed, and this Court denied certiorari. After the administrative proceeding resumed, the administrative law judge and the Judicial Officer for the Secretary of Agriculture ruled against Goetz and ordered the payment of assessments, late fees, and penalties. A petition for review was filed in the District Court for the District of Kansas, which affirmed the Judicial Officer's decision in all respects. The Tenth Circuit likewise affirmed. This petition asks this Court to grant, vacate, and remand (GVR) that decision of the Tenth Circuit.

The decision of the District Court for the District of Kansas rejecting Goetz's constitutional challenge to the proceeding is published at 920 F. Supp. 1123 and is reproduced as Appendix B (pages B1-B19). The decision of the Tenth Circuit affirming the district court's decision is published at 149 F.3d 1131 (*Goetz I*) and is reproduced as Appendix C (pages C1-C19). The decision of the ALJ ordering petitioner to pay fees, interest, and penalties is unpublished. The Decision of the Judicial Officer incorporating, modifying, and elaborating upon the ALJ's decision, and ultimately affirming that decision in relevant part, is published at 56 Agric. Dec. 1470, 1997 WL 730378 (USDA), and is reproduced as Appendix D (pages D1-D71). The decision of the Judicial Officer denying Goetz' petition for reconsideration is published at 57 Agric. Dec. 426, 1998 WL 174654 (USDA), and is reproduced as Appendix E (pages E1-E25). The decision of the District Court for the District of Kansas affirming the Judicial Officer's decision is published at 99 F. Supp.2d 1308 and is reproduced as Appendix F (pages F1-F22). The decision of the Tenth Circuit affirming the district court's decision is unpublished, not yet noted in a table in F.3d, but available in full at 2001 WL 401594 (*Goetz II*), and is reproduced as Appendix A (pages A1-A14).

JURISDICTION

The Tenth Circuit entered its judgment on April 20, 2001. On July 16, 2001, Justice Breyer granted petitioner an extension to and including August 9, 2001, in which to file this petition. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

At issue in this petition is the constitutionality of the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* (the Beef Act) and the Beef Promotion and Research Order, 7 C.F.R. Part 1260 (the Beef Order). The relevant provisions of the Beef Act and Beef Order are reproduced as Appendices G & H, respectively (pages G1-G7, and H1-H5).

STATEMENT OF THE CASE[1]

The Beef Act directs the Secretary to promulgate a Beef Order that provides for financing beef promotion and research through assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. §§ 2901(b), 2903, 2904(8)(A)-(C); 7 C.F.R. Part 1260.

The Beef Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. §§ 2904(8)(A) & (C); 7 C.F.R. §§ 1260.172(a)(1), 1260.310. Each person making payment to a cattle producer for cattle is a "collecting person" who is required to collect the assessments and remit them to the appropriate entities responsible for coordinating and spending such assessments. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.311(a), 1260.312(c).

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[1] Unless otherwise noted, the facts are taken from the Tenth Circuit's opinions in *Goetz I* and *Goetz II*, attached as Appendices C and A.

As both a "producer" and a "collecting person," petitioner is subject both to making payments on cattle he sells, and collecting and remitting payments on certain cattle he buys.

On October 29, 1993, the USDA commenced an administrative proceeding against Goetz because he failed to pay and remit certain required assessments. Goetz answered the administrative complaint and argued, among other things, that the Beef Act was unconstitutional on a variety of grounds, including under the First Amendment. *See* App. D2, D30 (noting administrative Answer and arguments alleging unconstitutionality).

On August 2, 1994, Goetz filed a civil action in the District Court for the District of Kansas challenging the constitutionality of the Beef Act and moved for a temporary restraining order to enjoin the administrative proceeding. The district court stayed the proceeding during an initial audit and continued the stay throughout the litigation.

In the district court, Goetz argued the Beef Act was unconstitutional because it (1) was beyond Congress' power to regulate interstate commerce, (2) imposed an unconstitutional direct tax, (3) effected an impermissible delegation of legislative authority, (4) violated the Takings Clause of the Fifth Amendment, (5) violated the Equal Protection Clause of the Fifth Amendment, and (6) infringed on the First Amendment rights of cattle producers.

On February 28, 1996, the district court upheld the constitutionality of the Beef Act, adopting the reasoning of the Third Circuit in *United States* v. *Frame,* 885 F.2d 1119 (CA3 1989), *cert. denied,* 493 U.S. 1094 (1990). The district court dismissed the complaint and set aside stay of the administrative proceeding. App. B19.

Goetz appealed.

On July 10, 1998, the Tenth Circuit in *Goetz I* rejected Goetz' appeal and affirmed the district court.

Regarding Goetz' First Amendment claims, the Tenth Circuit held that the district court erred in applying the test for restrictions on commercial speech, but nonetheless affirmed based on its reading of this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). App. C16-C17. In reaching this conclusion the Tenth Circuit simply ignored petitioner's discussion of the collectivization rationale on which *Glickman* was based, and offered no answer to petitioner's argument that, "[u]nlike the fact situations to which the [*Glickman*] decision has been restricted, the beef industry is not only a highly competitive industry, competition within the beef industry is fully protected by the antitrust laws." App. *I* 1 (Appellant's Supplemental Brief).

The Tenth Circuit also rejected Goetz' other remaining constitutional challenges. Regarding Goetz' Commerce Clause challenge, the Tenth Circuit concluded that the beef industry substantially affects interstate commerce, the objective of the Beef Act is valid, and the stimulation of the beef market is a proper regulatory activity. App. C12. The Tenth Circuit likewise rejected Goetz' Taxing Clause challenge, agreeing with the district court that the assessment was not a tax because the primary purpose of the Beef Act is regulation, not to raise revenues. App. C14-C15. Finally, the Tenth Circuit rejected Goetz' Equal Protection challenge, concluding that because no fundamental right was implicated, strict scrutiny did not apply and the Beef Act satisfied the rational basis test. App. C17-C19.

Goetz petitioned for certiorari, which this Court denied on January 19, 1999.

Following the district court's dismissal of Goetz' challenge and while the case was on appeal, the administrative proceeding resumed.

On February 26, 1997, the ALJ issued a Decision and Order finding that Goetz had violated the Beef Act and ordering Goetz to pay past due assessments, late fees, and penalties.

Goetz appealed the ALJ's decision to the Judicial Officer to whom the Secretary had delegated authority to act as a final deciding officer.

On November 3, 1997, the Judicial Officer issued a Decision and Order modifying, but generally affirming, the ALJ's order. The Judicial Officer recognized Goetz' continued pursuit of the constitutional challenges raised in *Goetz I*, but rejected each of those challenges.

Regarding the First Amendment challenge, the Judicial Officer held that *Glickman* was dispositive of the First Amendment issue and further relied upon the Third Circuit's decision in *Frame* and the district court's decision underlying *Goetz I*, both rejecting First Amendment challenges to the Beef Act. App. D35-36. The Judicial Officer also rejected Goetz' other constitutional challenges. App. D36-D48 (rejecting Goetz' Taxing Clause, Commerce Clause, and Equal Protection challenges).

Both sides filed motions for reconsideration.

On April 3, 1998, the Judicial Officer filed an order modifying its previous determinations on several matters in favor of the USDA, and denying reconsideration as sought by Goetz. The Judicial Officer's final order (1) ordered Goetz to cease and desist from violating the Beef Act; (2) assessed a civil penalty of $69,804; and (3) required payment of assessments and late fees of $66,913. App. E24-E25.

Goetz petitioned for review of the Judicial Officer's order to the United States District Court for the District of Kansas. In his petition, Goetz again reiterated and preserved his still-pending constitutional challenges at issue in *Goetz I*. App. J1-J2 (preserving constitutional challenges). The government answered, alleging that the constitutional challenges to the Beef Act were *res judicata*. App. K1.

On May 23, 2000, the district court affirmed the Judicial Officer in all respects. The district court's decision contained no discussion of the constitutional challenges, other than to

note that *Goetz I* had been decided against petitioner and that this Court had denied certiorari. App. F5-F6.

Goetz appealed.

On April 20, 2001, the Tenth Circuit affirmed, with no further discussion of the constitutional challenges it had addressed in *Goetz I*.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted, and the case vacated and remanded for reconsideration in light of *United Foods*, because the invalidation of assessments under the Mushroom Act in that case casts grave doubt on the validity of assessments under the Beef Act in this case.

I. THIS CASE SHOULD BE REEVALUATED BY THE TENTH CIRCUIT IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED FOODS*.

If there is any petitioner equitably entitled to a GVR in light of *United Foods*, it is Mr. Goetz: His initial First Amendment challenge (*Goetz I*) to the collection action in this case formed the basis of the split identified by the United States when seeking certiorari in *United Foods*, and was repeatedly relied upon by the United States in its unsuccessful defense of the Mushroom Act. The Tenth Circuit in *Goetz I* relied almost exclusively on the earlier decision of the Third Circuit in *Frame* and on this Court's decision in *Glickman*. Those cases likewise formed a substantial part of the government's basis for seeking certiorari in *United Foods*. The government's merits arguments in *United Foods* also relied heavily on *Frame* and *Glickman*, and those arguments were ultimately rejected by this Court.

In *United Foods*, this Court held that compelled support for mushroom promotion violated the First Amendment rights of objecting mushroom handlers. Addressing the question

"whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced," this Court held that the First Amendment barred such compelled support for speech. -- U.S. --, 121 S. Ct. at 2338.

This Court in *United Foods* distinguished its earlier *Glickman* decision on a variety of grounds and rejected the government's expansive interpretation of some of the language in *Glickman*. For example, in rejecting the government's argument that the First Amendment was not even implicated because the promotion program involved only "economic regulation," Brief for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Jan. 24, 2001), at 19, this Court held that its "precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection * * *. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree." -- U.S. --, 121 S. Ct. at 2338.

In another telling example, where the government had argued that regulation collectivizing the marketing of a commodity was irrelevant to *Glickman's* ruling, this Court disagreed, holding – just as Goetz had argued below – that

> [i]n *Glickman* we * * * emphasized "the importance of the statutory context in which it arises." 521 U.S., at 469. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.*, at 469. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.*, at 461. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid.* The

> producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.*, at 469. The opinion and the analysis of the Court *proceeded upon the premise that the producers were bound together* and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

United Foods, -- U.S. --, 121 S. Ct. at 2339 (emphasis added).[2] This Court then went on to identify the distinguishing characteristics of the mushroom program:

> The features of the marketing scheme found important in *Glickman* are not present in the case now before us. * * * Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemp-

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[2] In *Glickman*, the collectivization of the tree fruit industry was merely a "premise" upon which the case was argued and decided. It is not at all clear that such premise, suggested by the government and relied upon by this Court, was in fact *true*. *Compare* Brief for Petitioner, *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184, 1995 U.S. Briefs (Lexis) 1184 (July 29, 1996) ("regulatory framework uses monetary assessments to fund *collective activities* having an expressive component") (emphasis added), *with* Reply Brief (Merits) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Apr. 9, 2001), at 2 (contention that *Glickman* "turned on the comprehensive nature of the marketing orders ... rests on an *erroneous premise* regarding the extent of regulation of the California tree fruit industries") (emphasis added). Although not directly relevant here, given the questionable nature of the government's original assertions underlying this Court's "premise" of collectivization in *Glickman*, that case's result is called into doubt and the opinion might eventually prove to be unintentionally advisory *dicta* on a fact pattern not actually presented by the reality of the tree fruit industry.

> tion from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, * * * "the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." [197 F.3d], at 222, 223.

-- U.S. --, 121 S. Ct. at 2339.

In the present case, petitioner Goetz made precisely the same arguments in *Goetz I* that were relied upon by this Court in *United Foods*. App. *I* 1. Furthermore, the government argued, and the decisions below relied upon, precisely the same arguments *rejected* by this Court in *United Foods*. There can be no doubt, therefore, that the validity of the present collection action was sustained based on legal premises that have been definitively rejected by this Court's recent decision in *United Foods*.

Petitioner pressed his arguments at every point they remained available to him and was only forced off those arguments when they became *res judicata* as a result of the denial of certiorari in *Goetz I*. But with this Court's decision in *United Foods*, the Tenth Circuit's decision in *Goetz I* is no longer good law and has lost its *res judicata* effect. *See, e.g.*, *Spradling* v. *City of Tulsa*, 198 F.3d 1219, 1223 (CA10 2000) ("*[R]es judicata* and collateral estoppel are inapplicable where, between the first and second suits, an intervening change in the law or modification of significant facts create new legal conditions. * * * [An intervening Supreme Court decision] constitutes an intervening change in the law sufficient to render collateral estoppel and *res judicata* inapplicable."). Petitioner's constitutional arguments thus take on revived force and the Tenth Circuit should be required to reconsider those arguments in light of *United Foods*.[3]

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[3] Several of the other constitutional challenges raised by petitioner are also influenced by *United Foods*. For example, the application of rational ba-

II. THE BEEF ACT IS MATERIALLY INDISTINGUISHABLE FROM THE MUSHROOM ACT AND CANNOT SURVIVE A FIRST AMENDMENT CHALLENGE UNDER THE STANDARDS ARTICULATED IN *UNITED FOODS*.

The Beef Act at issue in this case is indistinguishable in all material respects from the Mushroom Act struck down in *United Foods*. Aside from the compelled promotion itself, there are no laws or regulations forcing cooperative marketing within the beef industry and certainly none forcing such co-operation among the beef producers who must pay the fees under the Beef Act. Indeed, the government itself acknowledged as much in numerous filings before this Court in *United Foods*. For example, when the United States sought certiorari in *United Foods* it argued that the Sixth Circuit's decision created a split with the Tenth Circuit's decision in *Goetz I*, which had upheld the Beef Act on the authority of the *Glickman* decision. *See* Petition for Writ of Certiorari, *United States* v. *United Foods, Inc.*, No. 00-276 (Aug. 18, 2000), at 11 ("the court of appeals' decision in this case conflicts with the Tenth Circuit's post-*Wileman Brothers* decision in *Goetz* v. *Glickman*").[4] The government was quite correct in its understanding that *United Foods* conflicted with *Goetz I*. And in light of this Court's affirmation of *United Foods*, *Goetz I* is no longer good law.

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sis scrutiny to Goetz' Equal Protection argument was premised on the notion that no fundamental interest was implicated by the Beef Act. That premise is no longer sound in light of *United Foods*. Additionally, should the government seek to defend the Beef Act by asking the courts to reconceptualize it as "government speech," rather than as the regulation and support of third-party speech – a view rejected by the courts below – such a revised view of the nature of the Beef Act would significantly alter the Tenth Circuit's analysis of petitioner's other constitutional challenges.

[4] *See also* Reply Brief (Cert.) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (November 3, 2000), at 6 ("the conflict that (quite aside from the holding of an Act of Congress unconstitutional) warrants this Court's intervention is * * * with *Goetz* v. *Glickman*").

The government further represented to this Court that the Mushroom and Beef Acts were equivalent for First Amendment purposes because the Beef Act "does *not* extensively regulate the relevant sector of the agricultural industry. The Beef Act, like the Mushroom Act, is concerned *solely* with 'promotion and advertising, research, consumer information, and industry information' funded through assessments on producers. 7 U.S.C. 2904(4)(B)." Petition for Writ of Certiorari, *United Foods*, at 11 (emphasis added). The Beef and Mushroom Acts "*are substantively identical*; both are concerned almost exclusively with the establishment of programs to promote an agricultural commodity that are funded by assessments on producers or handlers." Reply Brief (Cert.) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (November 3, 2000), at 6 (*comparing* 7 U.S.C. § 2901 *et seq. with* 7 U.S.C. § 6101 *et seq.*) (emphasis added); *id* ("The Secretary's orders implementing those programs are also *identical* in all pertinent respects. Compare 7 C.F.R. Pt. 1260 (Beef Order) with 7 C.F.R. Pt. 1209 (Mushroom Order).") (emphasis added).

In its briefs on the merits in *United Foods*, the government continued to emphasize the similarity between the Beef and Mushroom Acts. In discussing the pre-*Glickman* case of *Frame*, the government represented that, like the program then before this Court, the Beef Act "does not extensively regulate the relevant industry. The Beef Act, like the Mushroom Act, is concerned *solely* with 'promotion and advertising, research, consumer information, and industry information' funded through assessments on producers and importers. 7 U.S.C. 2904(4)(B)." Brief for the Petitioners, *United Foods*, at 23 (emphasis added). The government then cited with approval the description of the beef program in *Frame* that the Beef Act "'was structured as a "self-help" measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, while simultaneously avoiding the intrusiveness of govern-

ment regulation and the cost of government "hand-outs."'" Brief for the Petitioners, *United Foods*, at 24 (*quoting Frame*, 885 F.2d at 1122); *see also id.* (equating "'stand alone' generic advertising programs such as the ones here and in *Frame*").

Indeed, the government's brief in *United Foods* noted that this Court in *Glickman*

> was made aware of the differences in regulatory scope between the orders in *Wileman Brothers* and *Frame*. *See* Oral Argument Tr. at 26, *Wileman Bros.* (No. 95-1184) (government counsel explains that "[t]he beef program focuses almost exclusively on promotional programs and advertising"); *Frame*, 885 F.2d at 1122-1124; *see also Wileman Bros.*, 521 U.S. at 466-467 (discussing *Frame*).

Brief for the Petitioners, *United Foods*, at 24. Yet, as this Court subsequently noted in *United Foods*, it was precisely those differences in the tree fruit program that made all the difference to the result:

> The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

-- U.S. --, 121 S. Ct. at 2338-39.[5] Thus, the very difference between *Frame* and *Glickman* identified by the government in

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[5] *See also United Foods*, -- U.S. --, 121 S. Ct. at 2340 ("As noted above, the market for tree fruit was cooperative. To proceed, the statutory scheme used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. * * * Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*,

its *Glickman* arguments were the differences this Court emphasized in its *Glickman* decision and that in *United Foods* it described as "fundamental" to its ruling regarding the Mushroom Act.

Finally, insofar as there is different regulation in the beef industry than in the mushroom industry, it is regulation aimed at maintaining *competition* rather than cooperation or collectivization; precisely the opposite circumstances from those described in *Glickman*.[6] Such regulation squarely repudiates any collectivist notions regarding the beef industry and only strengthens the First Amendment interest at stake in this case, making this an even more compelling case than *United Foods* for striking down the compelled subsidies for speech.

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in furtherance of an otherwise legitimate program."); *id.* at 2340-41 ("The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object. * * * The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.").

[6] *See, e.g.*, Packers and Stockyards Act, 7 U.S.C. §§ 192(c) & (d) (unlawful for any packer to sell, buy, or transfer for another "any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly" or "for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce"); *id.* §§ 192(e) & (f) (unlawful to "[e]ngage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce" or to "[c]onspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices").

III. VACATUR AND REMAND SERVE THE EQUITIES OF THE CASE AND FURTHER THE ORDERLY AND EFFICIENT ADMINISTRATION OF JUSTICE.

This petition represents the final stage of a collection action threatening petitioner with over $130,000 in assessments, late fees, and penalties. Petitioner has, at every opportunity available to him, consistently and doggedly challenged the constitutionality of the Beef Act on which such assessments are based. While his challenges to date have been uniformly unsuccessful, they played a central role in the split that led to this Court's grant of certiorari in *United Foods* and have now been vindicated by this Court's decision in *United Foods*.

If the decision below is allowed to stand unexamined, petitioner will be forced to pay what is, to him, an inordinate amount of money on the basis of a law that is almost certainly unconstitutional. He would then be forced to initiate a new round of litigation to seek an uncertain refund of such unconstitutionally extracted funds. Rather than waste the limited time and resources of petitioner, the government, and the courts by forcing new litigation, this Court should instead adopt the more efficient remedy of vacatur and remand to allow the Tenth Circuit to reconsider its earlier position in light of *United Foods*. Such a result is both equitable to petitioner and a more efficient application of the time and resources of the courts and the parties.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and vacate and remand to the Tenth Circuit for reconsideration in light of *United Foods*.

Respectfully submitted,

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APPENDIX A

Unpublished opinion
F.3d – (CA10 2001) (Table); 2001 WL 401594 (Text)

United States Court of Appeals, Tenth Circuit.

Jerry GOETZ, d/b/a/ Jerry Goetz and Sons, Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; Dan Glickman, Individually and as the Secretary of the United States Department of Agriculture; and, The Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture, Defendants-Appellees.

No. 00-3173.

April 20, 2001.

Before KELLY and McKAY, Circuit JJ., and BRIMMER, District J.** [FN**]

ORDER AND JUDGMENT*

** The Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming, sitting by designation.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

BRIMMER.

Plaintiff-Appellant Jerry Goetz ("Goetz") appeals the district court's May 23, 2000 Order affirming the Secretary of Agriculture's order to pay assessments, late charges and civil penalties under the Beef Promotion and Research Act ("BPA"), 7 U.S.C. § 2901 et seq. Our jurisdiction arises under 28 U.S.C. § 1291 and we affirm.

Background

In 1986, Congress passed the BPA to establish a procedure for financing a beef promotion and research program. The BPA authorized the Secretary of Agriculture ("Secretary") to issue a beef promotion and research order requiring that "each person making payment to a producer for cattle purchased from the producer shall ... collect an assessment and remit the assessment to the [Cattlemen's Beef Promotion and Research] Board." 7 U.S.C. § 2904(8).

The Secretary thereafter issued the Beef Promotion and Research Order ("Order"), 7 C.F.R. § 1260.101 *et seq.* providing for an assessment of $1.00 per head of cattle sold. 7 C.F.R. § 1260.172(a). The assessment shall be collected by a "collecting person" meaning "the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act." 7 C.F.R. § 1260.106.

In 1987, the Kansas Beef Council sent a letter to Goetz containing the following paragraph:

> The Kansas Beef Council has been informed by producers selling cattle to you that you have collected from them a $1.00 per head assessment on cattle sold to you. The Kansas Beef Council has not received remittance of those dollars from you.

Aplt.App. at 998. The letter also informed Goetz that he was required to remit a $1.00 assessment on all cattle purchased from a producer and that his failure to do so might result in a civil penalty. A similar letter was sent in February and June

1992. Despite these warnings, Goetz never submitted any assessments from 1986 until October 29, 1993 when the Acting Administrator of the Agricultural Marketing Service filed a Complaint against Goetz.

The Complaint alleged willful violations of the BPA by Goetz. On September 25 and 26, 1996, a hearing was held before an Administrative Law Judge ("ALJ"). On February 26, 1997, the ALJ issued a Decision and Order finding Goetz liable for violating the BPA and ordering Goetz to pay past due assessments, late payment charges, and a civil penalty. On April 7, 1997, Goetz appealed the ALJ's decision to the Judicial Officer to whom the Secretary had delegated authority to act as a final deciding officer. On November 3, 1997, the Judicial Officer issued a Decision and Order modifying the ALJ's order.

Both parties filed motions for reconsideration of the Judicial Officer's order and on April 3, 1998, the Judicial Officer filed an order on the motions for reconsideration. The Judicial Officer's final order (1) ordered Goetz to cease and desist from violating the BPA; (2) assessed a civil penalty of $69,804.49; and (3) required payment of past due assessments and late payment charges of $66,913.00. Goetz appealed the Judicial Officer's order to the United States District Court for the District of Kansas. The district court affirmed the Judicial Officer's order in all respects.

Goetz now appeals to this Court and raises the following issues: (1) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties in the amount of $71,788.89 for the period of October 1, 1986 through December 31, 1989; (2) Did the district court err in affirming the Judicial Officer's decision that the Collection-Compliance Reference Guide did not establish a three year statute of limitations under the BPA; (3) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penal-

ties on cattle which Goetz sold at sale barns; (4) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on the cattle purchases listed on page 1032 of Appellant's Appendix in which Goetz had signed a non-producer status form; (5) Did the district court err in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on private treaty sales; and (6) Did the district court err in affirming the Judicial Officer's assessment of civil penalties.

Discussion

"When reviewing a district court's decision affirming an agency action, we employ the identical standard of review utilized by the district court." *American Colloid Co.* v. *Babbitt*, 145 F.3d 1152, 1154 (10th Cir.1998) (citation omitted). While the district court's decision is not given any deference, we do give deference to the agency's decision. *Id.* The agency's decision will be set aside "only if it is arbitrary, capricious, otherwise not in accordance with law, or not supported by substantial evidence." *Id.* (citing 5 U.S.C. § 706). "The court's function is exhausted where a rational basis is found for the agency action taken." *Sabin* v. *Butz*, 515 F.2d 1061, 1067 (10th Cir.1975).

A. Violations Arising Between October 1986 and December 1989

Goetz first challenges the Judicial Officer's determination of liability for past due assessments, late payment charges, and civil penalties for the period of October 1, 1986 through December 31, 1989. The amount of assessments, late payment charges, and civil penalties levied during this period were based on an auditor's estimates of the number of cattle Goetz had purchased during that period. The auditor estimated "these numbers based upon the average numbers for

the period January 1, 1999 through June 30, 1994." Aplt.App. at 1005.

Goetz claims a regular business practice of keeping records for only three years. As a result, Goetz claims there is no relevant evidence which shows to what extent, if any, Goetz may be liable for unpaid assessments under the BPA prior to January 1, 1990. He contends that the auditor's estimation is only a speculative inference and is therefore not "substantial evidence" which could support the agency's determination. See 5 U.S.C. § 706(2)(E).

Goetz's arguments fail to take into account the other evidence considered by the Judicial Officer. In particular, the Kansas Beef Council notified Goetz in a June 1, 1987 letter of his failure to remit the $1.00 assessments that he had collected from various producers. A similar letter was sent again in February 1992. In addition, the auditor testified that he arrived at his estimates after comparing Goetz's tax returns for the 1986 to 1989 period with those from 1991 to 1994. The auditor found that "[b]ased upon income tax records, there was no significant difference in [Goetz's] operations for these periods." Aplt.App. at 1005.

We find substantial evidence to support the Judicial Officer's determination of Goetz's liability for past due assessments, late payment charges, and civil penalties for the period of October 1, 1986 through December 31, 1989. The June 1987 and February 1992 letters provide substantial evidence of Goetz's failure to remit the $1.00 assessments. Further, in light of the auditor's review of Goetz's tax records and upon his finding that there was no significant difference in Goetz's operations during the years of 1986 through 1994, the auditor's estimation is more than a speculative inference.

We also find that the Judicial Officer's reliance upon the auditor's estimation was not arbitrary or capricious. *See Michigan Dept. of Educ. v. United States Dept. of Educ.*, 875 F.2d 1196, 1205-06 (6th Cir.1989) (concluding that agency's

use of a statistical sample as a basis for its findings of fact was not arbitrary or capricious). "[M]athematical and statistical methods are well recognized as reliable and acceptable evidence in determining adjudicative facts." *Id.*

Goetz also contends that allowing this estimation to shift the burden to Goetz violates his right to Due Process under the Fifth Amendment. Goetz offers only the following to support this proposition: "[d]ue process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules ." 16B AM.JUR.2D *Constitutional Law* § 960 (1998). However, the Court has already found substantial evidence to support the Judicial Officer's determination. Further, Goetz has failed to establish that reliance upon such evidence violated any established rules. Therefore, this Court finds no violation of due process.

B. Collection-Compliance Reference Guide

Goetz next contends that the district court erred in affirming the Judicial Officer's decision that the Collection-Compliance Reference Guide ("Guide") did not establish a three year statute of limitations. The Guide requires that a collecting person "maintain records and documentation pertaining to the [assessment] for at least three years following each transaction." Aplt.App. at 1129. Goetz argues that this provision should be deemed to establish a three year statute of limitations.

"An action on behalf of the United States in its governmental capacity is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir.1998) (citation omitted). Goetz does not direct the Court to any congressional enactment which establishes a statute of limitations on collection of assessments under the BPA. Goetz only points to the above provision of the Guide. However, as the Judicial Officer and the district court noted, the Guide is not a

regulation which is binding upon the Secretary, collecting persons, or producers. Instead, it is merely a reference designed to assist the state beef councils in their collection procedures. The Court concludes there is no "congressional enactment clearly imposing" a statute of limitations concerning collection of assessments under the BPA. *See id.* Therefore, we find no error in the Judicial Officer's determination that the Guide does not establish a statute of limitations.

Goetz also argues that allowing enforcement proceedings to extend beyond three years violates his equal protection rights under the Fifth Amendment. Goetz claims he is being punished for not keeping records longer than the Guide required and therefore more is required of him than of other producers. In order to show an equal protection violation, Goetz would first have to show that he was treated differently than other "similarly situated persons." *Jurado-Gutierrez v. Greene,* 190 F.3d 1135, 1152 (10th Cir.1999). However, Goetz offers no evidence that he was treated differently than anyone else. Therefore, we must reject Goetz's equal protection claim.

C. Sale Barns

Goetz next claims the district court erred in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on cattle which Goetz sold at sale barns. While Goetz's characterization of the issue is limited to cattle *sold* at sale barns, he first argues that he is never required to collect assessments on cattle which he *buys* at sale barns. Goetz then contends that his cattle "swapping" operations, resulting in the *sale* of cattle at sale barns, qualify for an exemption from the BPA. The first argument addresses Goetz's liability for collecting assessments under the BPA as a collecting person. The second argument, however, asserts an exception under the BPA which relieves a seller from having to pay an assessment to the collecting person. We will address the issue of cattle pur-

chased at sale barns before addressing the cattle swapping operations.

1. Cattle purchased at sale barns

Goetz argues that whenever he purchases cattle from a sale barn, he is never the collecting person, as the sale barn is always the designated collecting person. Goetz's only support for this assertion is a portion of the Guide providing that sale barns "can be collecting persons." Aplt.App. at 1127. As stated above, the Guide is not part of the regulations, and it is not binding on the Secretary, collecting persons, or producers. However, even if the Guide were held to create a binding rule, the language quoted cannot fairly be construed to mean that sale barns are always the collecting persons. The language itself only provides that a sale barn *can* be a collecting person. In addition, as discussed below, the Judicial Officer found at least one occasion where Goetz certified that he was collecting the assessment despite the fact that he was purchasing cattle at a sale barn. Therefore, we find no error in the Judicial Officer's failure to deem all purchases from sale barns as exempt from collection responsibilities.

2. Cattle sold at sale barns

Goetz also contends that his cattle swapping operations relieve him from producer status under the BPA and therefore he does not owe any assessment under the BPA upon the sale of such cattle. An assessment will not be levied on cattle owned by a person who:

> (i) Certifies that the person acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party, (ii) Establishes that such cattle were resold not later than 10 days from the date on which the person acquired ownership; and (iii) Certifies that the assessment levied upon the person from whom the person purchased the cattle, if an assessment was due, has been collected and has been remitted, or will be remitted in a timely fashion.

7 C.F.R. § 1260.314(a)(2). Here, Goetz claims his cattle swapping operations always qualify for this exemption. He refers to evidence in the record suggesting that such cattle are never brought to his feed lots, but are immediately transferred to another sale barn. In support of his claim, he contends that holding the cattle for a longer period of time would be far too costly.

Even assuming Goetz's claims regarding his cattle swapping operations as true, we would still not be persuaded by his arguments. The regulation is clear that three requirements must be met before one achieves the exemption of 7 C.F.R. § 1260.314(a)(2). Goetz's claim that the mere resale within ten days achieves the exemption is simply not supported by the plain language of the regulation. Therefore, the Court declines to write a wholesale exemption from assessment for those sale barn transactions involving Goetz's swapping business.

D. Non-Producer Status Forms

Goetz also contends the district court erred in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on certain cattle purchases where Goetz signed a Certification of Non-Producer Status form.[1] In this case, the auditor obtained from the Kansas Beef Council several non-producer status forms signed by Goetz and submitted to various sale barns. On these forms, Goetz certified that he had collected $1.00 per head. Goetz claims that this was the sole basis for the Judicial Officer's determination of liability for these purchases.

Goetz challenges the Judicial Officer's findings on several grounds. First, he offers his own testimony that he did not collect the $1.00 assessment and that the forms had been erroneously completed by someone at the sale barn to show that

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[1] These forms allow a buyer to obtain the 7 C.F.R. § 1260.314 exemption referred to above.

an assessment had been collected. However, the ALJ and the Judicial Officer both rejected Goetz's argument denying collection of the $1.00 assessment and asserting the forms had been erroneously completed. The ALJ's decision was based on a credibility finding. The ALJ was in a far better position than this Court to judge the credibility of Goetz on this point. Therefore, it is proper to defer to the ALJ's judgment of credibility on this issue. *See Webco Indus., Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir.2000) ("The ALJ's credibility resolutions deserve great weight to the extent they are based on testimonial evidence of live witnesses and the hearing judge has had the opportunity to observe their demeanor." (citation and quotation omitted)).

Goetz also contends that the auditor admitted that all of the cattle referred to in this section were resold within ten days of Goetz's purchase and should therefore be exempt from the BPA assessments. Goetz's arguments fail to address the issue at hand. The issue is not whether Goetz failed to pay assessments on the cattle he sold, but whether he failed to *remit* assessments collected on cattle he had purchased. Reselling cattle within ten days does not obviate the need to collect or remit assessments on cattle purchased from a producer. *See* 7 C.F.R. § 1260.314(a)(2)(iii). Rather, the non-producer exemption of 7 C.F.R. § 1260.314(a)(2) only means that Goetz would not be required to pay a collecting person an assessment upon Goetz's subsequent resale of the cattle. 7 C.F.R. § 1260.314(a). Here, the Judicial Officer, found that Goetz had collected the assessment on cattle he purchased, and that he failed to remit it to the proper beef council. The Judicial Officer found Goetz liable for these collections despite the fact that Goetz had resold the cattle within ten days. We find that the Judicial Officer's ruling was based upon a correct view of the regulation and Goetz's argument on this point is unpersuasive.

Next, Goetz argues that the cattle referred to in this section were part of his cattle swapping operations and he rear-

gues the points asserted in the previous section. The Court has already fully addressed Goetz's arguments on this issue. For the reasons stated above, we reject this argument.

Finally, Goetz contends the purchase invoices for the cattle at issue do not indicate any deduction was withheld for the assessments. However, this evidence is not sufficient for this Court to alter the Judicial Officer's findings on this issue. It is not our duty to reweigh the evidence, our review is limited to determining whether substantial evidence exists to support the Judicial Officer's decision. *N. Coal Co. v. Dir., Office of Workers' Comp. Programs,* 100 F.3d 871, 873 (10th Cir.1996). We hold that the certification of non- producer status provides substantial evidence to support the Judicial Officer's conclusion that Goetz had collected, but failed to remit, the assessments.

E. Private Treaty Sales

Private treaty sales are defined by the Guide as a sale between producers. Aplt.App. at 1133. Goetz argues there is never a designated collecting person in a private treaty sale and therefore he cannot be held liable for unpaid assessments from such a sale until the Secretary proves that the seller failed to remit the proper assessments for these transactions.

The regulations provide for the collection of assessments as follows:

> (a) A $1.00 per head assessment on cattle sold shall be paid by the producer of the cattle in the manner designated in § 1260.311.
>
> * * * *
>
> (c) Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.

7 C.F.R. § 1260.310. According to the Guide, "[f]or private treaty sales, either the buyer or the seller may be the collecting person." Aplt.App. at 1129. However, "both are responsible for ensuring that the [assessment] is collected and remitted. *Id.*

The Judicial Officer, as well as the ALJ, found that Goetz was the designated collecting person under the regulations in the private treaty sales which were at issue. " 'Collecting person' means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary." 7 C.F.R. § 1260.106. Upon reviewing the agency's determination on this issue, the Court is reminded that

> [W]e must give substantial deference to [the agency's] interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Rocky Mountain Radar, Inc. v. F.C.C., 158 F.3d 1118, 1123 (10th Cir.1998) (citation omitted).

Under the BPA, the buyer is generally regarded as the collecting person. *See* 7 C.F.R. § 1260.172(a) ("Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person"); 7 C.F.R. § 1260.311 ("Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be ... each person making payment to a producer for cattle purchased"). The provisions of the Guide providing that the buyer or the seller can be a collecting person do not change the general provisions found in the regulations. The fact that either may be a collecting person does not affect the notion that buyers are generally regarded as the collecting person.

Nor does the Guide's statement that both the buyer and seller are responsible for the collection and remission of assessments alter the general assumption. The regulations provide that the collecting persons failure to remit the assessments does not alter the liability of the producer for paying the assessment. *See* 7 C.F.R. § 1260.310. Therefore, the Guide's provision that both the buyer and seller in private treaty sales are responsible for the unpaid checkoffs until they are remitted does not alter the regulations as Goetz suggests.

Goetz, as the person making payment for the cattle, is reasonably considered to be a collecting person. *See* 7 C.F.R. § 1260.172(a). In light of the deference we must give to the agency's interpretation of its regulations, we find that the Judicial Officer's finding that Goetz was the collecting person in these private treaty sales was not plainly erroneous or inconsistent with the regulations. *See Rocky Mountain Radar,* 158 F.3d at 1123.

F. Civil Penalties

Finally, Goetz challenges the assessment of penalties in the amount of $69,804.49. The statute provides: "If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may ... (2) assess a civil penalty of not more than $5,000 for violation of such order." 7 U.S.C. § 2908(a)(2). Goetz argues that this allows only one $5,000 penalty after any administrative hearing. The Judicial Officer and the District Court held that this allowed a $5,000 penalty for each violation of the statute.

Our analysis of this situation is guided by the following:

> In interpreting a statute, the starting point is the statutory language. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. In other words, unless the statu-

tory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control.

Long v. Bd. of Governors of the Fed. Reserve Sys., 117 F.3d 1145, 1157 (10th Cir.1997).

We find that the statutory penalty provision is not ambiguous. Goetz correctly perceives that a penalty may be assessed only after an administrative hearing. However, the statute does not say that only one $5,000 fine is allowed per hearing. On the contrary, it allows a penalty of not more than $5,000 for violation of an order.

Neither do we believe this interpretation would lead to absurd results. Allowing a $5,000 fine for each violation of the order helps to ensure that purposes of the BPA are attained, namely organizing "an orderly procedure for financing ... a coordinated program of promotion and research." 7 U.S.C. § 2901(b). Goetz's interpretation (allowing only one $5,000 fine after any administrative hearing) would have little effect in deterring prospective violators of the BPA who, like Goetz buy and sell up to 200 cattle per day.

In this case, Goetz was found in be in violation of the BPA order on several different occasions. Therefore, the Secretary's assessment of $69,804.49 in penalties for Goetz's multiple violations of the BPA complies with the plain language of the statute.

Conclusion

In sum, we hold that the judgment of the Judicial Officer should not be set aside. Therefore, the district court's Memorandum and Order is AFFIRMED.

APPENDIX B

920 F.Supp. 1173

United States District Court,

D. Kansas.

Jerry GOETZ d/b/a Jerry Goetz and Sons, individually and on behalf of all

others similarly situated, Plaintiff,

v.

Dan GLICKMAN, Secretary, United States Department of Agriculture, Defendant.

Civil Action No. 94-1299-FGT.

Feb. 28, 1996.

Clarence L. King, Jr., David Klaassen, Brian Wilson Wood, Hampton, Royce, Engleman & Nelson, Salina, KS, for Jerry Goetz.

Stephen K. Lester, Randall K. Rathbun, Office of United States Attorney, Wichita, KS, Thomas W. Millet, Frank W. Hunger, U.S. Department of Justice, Civil Division, Washington, DC, Felicia L. Chambers, U.S. Department of Justice, Washington, DC, for U.S. by and on behalf of its agency, U.S. Dept. of Agriculture, Secretary of Agriculture, Dan Glickman.

Brian E. Gardner, Morrison & Hecker, L.L.P., Kansas City, MO, for National Pork Producers and National Pork Producers Council amicus.

James A. Walker, Rachael K. Pirner, Triplett, Woolf & Garretson, Wichita, KS, JamesD. Keast, Carmody, MacDonald, Hilton, Wolf & Keast, P.C., St. Louis, MO, for American Soybean Ass'n amicus.

James A. Riedy, McDermott, Will & Emery, McDermott, Will & Emery, Washington, DC, for National Potato Council amicus.

Dennis L. Gillen, Depew and Gillen, L.L.C., Wichita, KS, John G. Roberts, Jr., Hogan & Hartson, L.L.P., Washington, DC, Richard T. Rossier, Marc E. Miller, McLeod, Watkinson & Miller, Washington, DC, for Willie Reibel, Rodney Mense, Larry Mense, Jan Lyons, Kansas Livestock Association, National Cattlemen's Association and National Live Stock and Meat Board.

MEMORANDUM AND ORDER

THEIS, District Judge.

The plaintiff Jerry Goetz d/b/a Jerry Goetz and Sons (hereinafter Goetz or plaintiff) brought this action challenging the constitutionality of the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 et seq. The plaintiff seeks to represent a class of all persons subject to the requirements of the Beef Promotion and Research Act of 1985, including all persons who have been required to pay the assessment of one dollar per head of cattle sold, as required by the Act. Also appearing in this case are intervenors Willie Reibel, Rodney Mense, Larry Mense, Jan Lyons, who are Kansas cattle ranchers, and Kansas Livestock Association, National Cattlemen's Association, and National Live Stock and Meat Board, three nonprofit beef industry groups.

Presently pending before the court are: (1) the defendant Secretary of Agriculture's motion to dismiss, Doc. 29, (2) the defendant's motion to dismiss the first amended complaint, Doc. 112, (3) plaintiff's motion for summary judgment, Doc. 73, (4) plaintiff's motion for summary judgment on the first amended complaint, Doc. 118, (5) intervenors' motion to dismiss the complaint, Doc. 101, (6) intervenors' motion to dismiss the first amended complaint, Doc. 110, and (7) plaintiff's renewed motion for summary judgment, Doc. 131. The court has considered the briefs, heard oral argument on these

matters, and is prepared to rule. For the reasons discussed in this opinion, the defendant's and intervenors' motions to dismiss shall be granted.

Other pending motions which were not argued at the hearing include: (1) plaintiff's motion for class certification, Doc. 22, and (2) defendant's motion for reconsideration of preliminary injunction orders, Doc. 32. Given the court's resolution of the motions to dismiss and for summary judgment, the remaining motions do not need to be addressed.

The Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research Order ("the Order"), that provides for financing beef promotion and research through assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. § 2901(b), 2903, 2904(8)(A)-(C). The Order established by the Secretary (7 C.F.R. Part 1260, Subpart A) established the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Beef Board") and the Beef Promotion Operating Committee ("the Operating Committee"). 7 U.S.C. § 2904(1)-(7); 7 C.F.R. 1260.141, 1260.161. The Cattlemen's Beef Board is made of cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141. The Board's principal duties are to administer the Order, make rules and regulations to effectuate the terms and provisions of the Order, elect members of the Board to serve on the Operating Committee, to approve or disapprove the budgets submitted by the Operating Committee, to receive, investigate and report to the Secretary complaints of violations of the Order, and the recommend to the Secretary amendments to the Order. 7 U.S.C. § 2904(2)(A)-(F).

The Operating Committee is composed of ten members of the Cattlemen's Beef Board and ten members elected by a federation of State beef councils. 7 U.S.C. § 2904(4)(A); 7 C.F.R. 1260.161. The Operating Committee develops and submits to the Secretary for approval promotion, advertising,

research, consumer information and industry information plans and projects. 7 U.S.C. § 2904(4)(B); 7 C.F.R. 1260.168. The Act prohibits the use of funds for political purposes. 7 U.S.C. § 2904(10).

The Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. § 2904(8)(A) & (C); 7 C.F.R. 1260.172(a)(1), 1260.310. Each person making payment to a cattle producers for cattle is a "collecting person" who is required to collect the assessments and remit them to a qualified State beef council in the State in which the collecting person resides, or, if there is no qualified State beef council, to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. 1260.311(a), 1260.312(c). Each collecting person must report to the Board certain information for each calendar month at the time the assessments are remitted and must maintain and make available for the Secretary's inspection the records necessary to verify the reports. 7 U.S.C. § 2904(11); 7 C.F.R. 1260.201, 1260.312(a)-(c), 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine if there has been a violation of the Act, the Order, or the rules and regulations thereunder. 7 U.S.C. § 2909. After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for each violation of the Act and the Order. *Id.* § 2908(a). In addition, the Secretary may request the Attorney General to initiate a civil action to enforce, and to restrain a person from violating, any order or regulation under the Act. *Id.* § 2908(b), (c).

Within 22 months of the issuance of the Order, the Act required the Secretary to conduct a referendum among those persons who were producers and importers during that trial period. The Order would continue to operate only upon approval by a majority of those participating in the referendum. 7 U.S.C. § 2906(a). Prior to the referendum, a cattle producer who paid the assessment could demand a one-time refund. *Id.*

§ 2907; 7 C.F.R. 1260.173, 1260.174. On May 10, 1988, the referendum was conducted and the Order was approved.[1]

Plaintiff is a "producer" within the meaning of the Act. 7 U.S.C. § 2902(12). As a producer, plaintiff is subject to the one dollar per head assessment upon the sale of cattle. Plaintiff alleges that at times he makes payments to other producers for cattle purchased from such producers, and thus he is a "collecting person" under the Act. *Id.* § 2904(8)(A). As a collecting person, plaintiff is subject to the collecting provisions of the Act and accompanying regulations.

On or about October 29, 1993, the Secretary commenced an administrative proceeding to enforce the provisions of the Act against plaintiff. The Administrative Judge scheduled a hearing for August 8, 1994. On August 2, 1994, simultaneously with filing his civil action, the plaintiff filed a motion for a temporary restraining order to enjoin the Secretary from proceeding with the administrative hearing. The court entered a temporary restraining order which expired on August 15, 1994. On August 19, 1994, the parties agreed, with the court's approval, to stay the administrative proceedings until October 1, 1994. As a part of this agreement, plaintiff consented to providing all pertinent records to an accounting firm that was conducting an audit on defendant's behalf. The stay of administrative proceedings has since been continued by the court over the defendant's objection.

Plaintiff alleges that he has no desire to associate with the Secretary, the Cattlemen's Beef Board, the Operating Committee, or any State beef council in any matters related to the Beef Promotion Act. Plaintiff further asserts that he has no desire to participate in or financially support any advertising

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[1] The statute authorizes the Secretary to conduct an additional referendum on the request of 10% or more of cattle producers to determine whether cattle producers favor the termination of the Order. 7 U.S.C. § 2906(b). According to the statements made at oral argument, that option, while still available, has never been exercised.

campaign or promotional endeavor undertaken by any of these persons or entities. In his complaint, plaintiff prayed for a temporary restraining order and preliminary injunction staying the administrative proceedings brought by the Secretary against him. The other counts pleaded in the amended complaint assert that the Act is unconstitutional under the following theories: lack of constitutional authority under commerce clause and taxing powers, and unconstitutional delegation of legislative authority; violation of equal protection rights; taking for a non-public use without just compensation; violation of right to free association; violation of right to free speech; violation of right of freedom of belief and freedom of conscience. Plaintiff seeks a ruling that the Act is unconstitutional, an injunction against enforcement, and a refund of any unspent monies.

The defendant argues that the Act does not violate any of plaintiff's constitutional rights. The defendant relies primarily on *United States v. Frame,* 885 F.2d 1119 (3d Cir.1989), *cert. denied,* 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990), in which the Third Circuit rejected a virtually identical challenge to the Act. This courtfinds the *Frame* decision persuasive and will follow it, as discussed below.

I. Commerce Powers

The plaintiff concedes that Congress purported to rely on its commerce powers in enacting the Beef Promotion Act. Plaintiff argues that the activity being regulated does not substantially affect interstate commerce. Plaintiff further argues that the Beef Promotion Act is not regulatory because Congress does not have the power to "stimulate and promote" commerce. Plaintiff asserts that the power granted to Congress to regulate commerce is limited to (1) leaving the activity alone; (2) restricting the activity; or (3) prohibiting the activity.

Plaintiff next argues that there is no rational connection between the regulatory means selected and the asserted ends.

Other commodity groups have sought and received similar assistance from the government. The government has set up a pork promotion and research board (*see* Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. § 4801 et seq.) which performs similar functions and funds comparable advertisements. Plaintiff argues that pork is the primary competitor of beef in the marketplace. Plaintiff asserts that it is not reasonable for the Secretary to engage in such conflicting programs.

There are three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the protection of the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) the regulation of those activities having a substantial relation to interstate commerce (those activities that substantially affect interstate commerce). *United States v. Lopez*, 514 U.S. 549, ---- - ----, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995). While the defendant argues that the Act may be upheld under both the second and third categories noted above, this court intends to focus solely on the third category.

An act of Congress which adjusts the burdens and benefits of economic life comes to the court with a presumption of constitutionality. *Hodel v. Indiana*, 452 U.S. 314, 323, 101 S.Ct. 2376, 2382-83, 69 L.Ed.2d 40 (1981). A court may invalidate a statute enacted under the commerce clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce; or that there is no reasonable connection between the regulatory means selected and the asserted ends. *Id.* at 323-24, 101 S.Ct. at 2382-83.

When asked to determine whether a particular exercise of congressional power is valid under the commerce clause, the court's task is narrow. The court must defer to a congressional finding that the regulated activity affects interstate commerce if there is any rational basis for such a finding.

Once this is established, the only remaining inquiry is whether the means chosen by Congress are reasonably adapted to the end permitted by the constitution. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17, 110 S.Ct. 914, 924-25, 108 L.Ed.2d 1 (1990).

When Congress passed the Beef Promotion Act, it made the following findings:

> (1) beef and beef products are basic foods that are a valuable part of human diet;
>
> (2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;
>
> (3) beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;
>
> (4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;
>
> (5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and
>
> (6) beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

7 U.S.C. § 2901(a).

Congress declared the following purpose and objectives in the Beef Promotion Act:

> It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this Act shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2901(b).

Plaintiff argues that Congress was intending to regulate advertising in the Act. Plaintiff ignores the language of the statute, which provided that the purpose of the Act was to strengthen the beef industry, not to regulate the advertising industry. The objectives contained in the Act are valid. The stimulation of trade in a particular industry is a proper regulatory activity. It was a legitimate goal for Congress to seek to strengthen the beef industry.

Plaintiff ignores reality by taking the position that the production of beef does not substantially affect interstate commerce. Plaintiff ignores the fact that beef and beef products move in interstate commerce. It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause. Congress had a rational basis for finding that the beef industry substantially affects interstate commerce.

This court rejects the plaintiff's argument that the commerce power is limited to restricting or prohibiting an activity. As the Third Circuit noted in *United States v. Frame*, 885 F.2d at 1126, "it is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." The Beef Promotion Act regulates interstate commerce in beef through the imposition of a monetary assessment. The collected assessments are spent on beef promotion and advertising. Advertising stimulates consumer demand for the product being promoted. *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343, 106 S.Ct. 2968, 2977-78, 92 L.Ed.2d 266 (1986). The promotion of beef represents a valid exercise of Congress' broad power to stimulate commerce. *United States v. Frame*, 885 F.2d at 1125.

The *Frame* decision also rejected the argument that the Act was not a "regulatory" program. The Third Circuit found that Congress established the Act to "strengthen and expand" the nation's beef markets. *Id.* The court noted Congress has in the past regulated commerce by influencing the supply side of agricultural markets (through quotas, loans and subsidies) as well as the demand side (through direct government purchases). In passing the Beef Promotion Act, Congress chose to promote and stimulate the demand side of the market indirectly, by influencing consumer attitudes towards beef. *Id.* at 1126. As noted in *Frame*, the legal definition of "regulate," rather than a more restrictive definition from a standard dictionary of the English language, should be applied in this context. *Id.* at 1126 n. 5.

In *Frame*, the court likewise considered an argument that the Act is unconstitutional because no "activity" is being regulated. In *Frame*, the defendant argued that Congress' failure to specify the particular activity being regulated was fatal. The court stated, "we decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the 'activity' of

'consumer beef purchases,' 'interstate beef sales,' or 'national beef markets.' Each activity is related, and is validly regulated by Congress." *Id.* at 1127.

Finally, the *Frame* court considered whether there was a rational connection between the regulatory means selected and the asserted ends. The court stated, "To stimulate the demand for beef, the lack of which Congress has determined is harming the beef industry, Congress has chose from its arsenal of regulatory means promotion and advertising, research, consumer information and industry information. These endeavors are rationally related to the maintenance and expansion of the nation's beef markets." *Id.* Accordingly, the court concluded that the Beef Promotion Act was a valid exercise of Congress' power to regulate interstate commerce. *Id.*

This court agrees with the reasoning and holding of the Third Circuit. The means selected by the Act are reasonably related to the congressional objectives. The Act sets up a system of promotion, advertising and research. These provisions are reasonably calculated to further the goal of strengthening the position of beef in the marketplace by stimulating consumer demand for beef and increasing sales of beef.

Plaintiff argues that the promotion of beef is offset by other promotion schemes, such as for pork. The court finds it to be rational for Congress to seek to stimulate various sectors of the agricultural economy, including competitors of the beef industry. It would be rational for Congress to find that the stimulation of demand in all sectors of the agricultural economy would be in the public interest, benefiting the overall economy through increased domestic consumption and export of agricultural products. The court concludes that it is reasonable for Congress to promote more than one segment of the agriculture industry.

The court concludes that the Act is a valid exercise of the commerce power because it is reasonably adapted to the goal

of strengthening the beef industry. It is not for this court to determine if Congress selected the best means for achieving its stated goal. That this court (or the plaintiff) could devise a regulatory scheme that is somehow "better" does not render the Beef Promotion Act unconstitutional. The Supreme Court's words in *Preseault* are instructive: "The process of legislating often involves tradeoffs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of Congress' ends does not render it irrational." *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 19, 110 S.Ct. 914, 925, 108 L.Ed.2d 1 (1990).

The Supreme Court's recent case, *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), which struck down the Gun-Free School Zones Act of 1990 under the commerce clause, does not dictate a different analysis or result. While striking down the Gun-Free School Zones Act because it did not substantially affect interstate commerce, the Supreme Court reiterated the broad powers of Congress to regulate the use of the channels of commerce, to regulate and protect the instrumentalities of commerce or persons or things in commerce, and to regulate those activities having a substantial relation to interstate commerce or substantially affecting interstate commerce.

In *Lopez*, the Court noted that it has upheld a wide variety of congressional acts regulating intrastate economic activity when the Court had concluded that the activity substantially affected interstate commerce. When economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1630. After analyzing the Gun-Free School Zones Act, the Supreme Court concluded that it had nothing to do with any sort of economic enterprise. The Act could not be sustained as a regulation of a commercial transaction which substantially affect interstate commerce. *Id.* at ---- - ----, 115 S.Ct. at 1630-31.

The Court next turned to a consideration of whether the statute contained a jurisdictional element which would ensure that the firearm possession affected interstate commerce. The statute in question did not contain an express jurisdictional element which would limit the reach of the statute to those situations which have an explicit connection with or effect on interstate commerce. *Id.* at ----, 115 S.Ct. at 1631. The Court noted that as part of its evaluation of constitutionality under the commerce clause, the Court considers legislative findings regarding effect on interstate commerce. *Id.* However, Congress normally is not required to made formal findings as to the substantial burdens that an activity has on interstate commerce. *Id.* The Court rejected the government's various arguments regarding the potential effects that firearm possession in a school zone would have on interstate commerce. *Id.* at ---- - ----, 115 S.Ct. at 1631-34.

As contemplated by the Supreme Court in *Lopez*, the present case involves a situation in which economic activity substantially affects interstate commerce. Additionally, Congress has provided a number of legislative findings in the Beef Promotion Act regarding the effect of the beef industry on interstate commerce.

II. Taxing Powers

The plaintiff next argues that the assessment is a direct tax which is invalid because it is not apportioned as required by the constitution. Plaintiff argues that the raising of revenue is the primary purpose of the statute. Plaintiff asserts that the district court in *Frame* found the assessment under the Act to be a tax. However, the district court assumed arguendo that the Act was an exercise of Congress' taxing powers in order to address the argument that Congress had unlawfully delegated its taxing powers to the Secretary of Agriculture. *United States v. Frame*, 658 F.Supp. 1476, 1479 (E.D.Pa.1987). This argument was not addressed by the Third Circuit in *Frame* because the issue was abandoned on appeal. 885 F.2d at 1125 n. 4.

A regulatory scheme will not constitute a tax unless the real purpose and effect of the statute and regulations promulgated thereunder is to raise revenues for the general support of the government. *Cities Service Co. v. Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp.Emer.Ct.App.1975) (citing *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 595, 5 S.Ct. 247, 252, 28 L.Ed. 798 (1884)), *cert. denied*, 426 U.S. 947, 96 S.Ct. 3166, 49 L.Ed.2d 1184 (1976). The test is well-established:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Cities Service Co., 529 F.2d at 1029 (quoting *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir.1943)); *see also Mulroy v. Block*, 569 F.Supp. 256, 261 (N.D.N.Y.1983), *aff'd per curiam*, 736 F.2d 56 (2d Cir.1984), *cert. denied*, 469 U.S. 1159, 105 S.Ct. 907, 83 L.Ed.2d 922 (1985).

The Beef Promotion Act does not raise revenue for the government. Regulation (in the form of promotion of the beef industry) is the primary purpose of the statute. The mere fact that money changes hands in the pursuit of this object does not render the scheme a tax.

III. Delegation of Legislative Authority

Plaintiff argues that Congress impermissibly delegated its legislative powers, including its taxing and spending powers, to the Secretary, the Cattlemen's Beef Board and the Operating Committee. A similar delegation argument was rejected

by the Third Circuit in *Frame*. The court rejects this argument for the same reasons set forth by the Third Circuit.

The Third Circuit rejected the contention that the Act unlawfully delegated legislative authority to the Secretary. Congress not only provided standards for administration of the Act, it set forth with specificity the terms of the Act's implementation. Congress set the amount of the assessment at $1.00 per head. 7 U.S.C. § 2904(8)(C). Congress set forth detailed procedures for the selection of the Cattlemen's Beef Board and the Operating Committee. 7 U.S.C. § 2904(4)(A). *See Frame*, 885 F.2d at 1128.

The Third Circuit likewise rejected the contention that the Act unlawfully delegated legislative authority to members of the beef industry. The Act and the Order place the Board under the Secretary's "pervasive surveillance and authority." *Id.* at 1129. The Board is appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141(b). Members of the Board and the Operating Committee are subject to removal by the Secretary. 7 C.F.R. 1260.212. The Secretary must be given notice of all meetings and must approve all budgets and contracts. 7 U.S.C. § 2904(4)(C), 2904(6)(A)-(B); 7 C.F.R. 1260.150(f), (g) & (m), 1260.168(e) & (f), 1260.168(h). The Third Circuit concluded that the Board and the Committee serve an advisory and ministerial function. Congress has set the amount of the assessments and the Secretary ultimately decides how the funds will be spent. *See Frame*, 885 F.2d at 1128-29.

IV. Taking

Plaintiff claims that the Beef Promotion Act violates the fifth amendment's takings clause, specifically that the Act constitutes a taking for a non-public use without just compensation. Plaintiff claims that his property (money) has been taken from him to confer a private benefit on private interests within the beef industry.

The *Frame* court rejected the argument that the Act is an unconstitutional taking of property for a private purpose. The Third Circuit noted that the fifth amendment prohibits the government from taking property for private use, but found that the Beef Promotion Act "was clearly enacted for a public purpose." *Frame*, 885 F.2d at 1138. The determination of what constitutes a public use belongs initially to the legislature, and the court should not substitute its judgment for that of the legislature "unless the use be palpably without reasonable foundation." *Id.* (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984)).

Congress believed the Beef Promotion Act was in the public interest. *See* 7 U.S.C. § 2901(b) (quoted supra). Because the beef industry plays a significant role in the national economy and because the success of that industry is vital to the national economy, 7 U.S.C. § 2901(a)(2) & (4), Congress found the promotion of beef to be in the public interest. 7 U.S.C. § 2901(b). The Third Circuit concluded that Congress had, at the very least, a reasonable basis for concluding that such legislation would be in the public interest. *Frame*, 885 F.2d at 1139.

The court will not second-guess the Congress' determination that stimulation of the beef industry is in the public interest. Even if there was a taking, it was for a public use and the plaintiff receives just compensation in the form of the promotion and research aspects of the Act.

V. Freedom of Speech and Association

Plaintiff's First Amendment challenge encompasses both freedom of association and freedom of speech. The *Frame* decision rejected these arguments. Again, this court is persuaded by the Third Circuit's reasoning.

The defendant and intervenors argue that the speech at issue here is "government speech" and immune from First

Amendment scrutiny. The *Frame* court found the issue to be close, but found it instead to be "commercial speech." 885 F.2d at 1130-1133. The court noted that the following three part test applies to restrictions on commercial speech: (1) the state must assert a substantial government interest; (2) the regulatory technique must be in proportion to that interest; (3) the incursion on commercial speech must be designed carefully to achieve the state's goal. *Id.* at 1133. However, the *Frame* court found that the free association claims triggered a higher standard of scrutiny than that applied in commercial speech cases: governmental interference with associational rights must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 1134 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 3252-53, 82 L.Ed.2d 462 (1984)).

The Third Circuit ruled that the Act would be constitutional only if the government could demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms. The court concluded that the importance of the governmental interest justified the slight incursion on associational and free speech rights. *Id.* The court found the national interest in maintaining and expanding beef markets to be compelling. *Id.* The purpose underlying the Act was found to be neutral. The government sought to bolster the image of beef solely to increase sales, not to prescribe any official view. *Id.* at 1135. Finally, the court found the infringement on first amendment rights to be slight. The Board is authorized to engage in commercial speech on behalf of beef producers, to promote the product the producers have chosen to market. The Board is prohibited from spending funds for political activity. The court concluded that the Act was drafted in a way that infringes on the contributors' rights

no more than necessary to achieve the stated goal. *Id.* at 1135-37.

This court is persuaded by the Third Circuit's decision on the first amendment issues. Accordingly, the court rejects the plaintiff's arguments that the Act violates his freedom of speech and association.

VI. Equal Protection

As the *Frame* court noted, the fifth amendment contains an implicit equal protection component that prohibits the federal government from discriminating between individuals or groups. "Unless the statute creates a suspect classification or impinges upon a constitutionally protected right, however, it need only be shown that the differential treatment bears 'some rational relationship to a legitimate state purpose.' " *Id.* at 1137 (quoting *City of Dallas v. Stanglin,* 490 U.S. 19, 23, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18 (1989)).

Plaintiff does not argue that the Act categorizes on the basis of an inherently suspect characteristic such as race. Plaintiff argues that the Act impinges upon his fundamental first and fifth amendment rights and, accordingly, the Act is to be reviewed under the strict scrutiny standard. However, unless a classification actually jeopardizes the exercise of a fundamental right, the equal protection clause requires only that the classification rationally further a legitimate governmental interest. *Nordlinger v. Hahn,* 505 U.S. 1, 8-12, 112 S.Ct. 2326, 2331-32, 120 L.Ed.2d 1 (1992); *United States v. Phelps,* 17 F.3d 1334, 1344 (10th Cir.), *cert. denied,* 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994); *O'Connor v. City and County of Denver,* 894 F.2d 1210, 1223-24 (10th Cir.1990). Since the court has already ruled that the legislative classification does not infringe the plaintiff's first and fifth amendment rights, the strict scrutiny standard of review does not apply.

Plaintiff argues additionally that the Act does not pass the rational relationship test. Plaintiff argues that there is no ra-

tional reason why a program which is supposed to benefit the entire industry should be subsidized by producers and importers only. The court disagrees. As noted in *Frame*, there are several rational bases for Congress' decision: an assessment on the initial sale of cattle is easier to administer; ranchers would be the most benefitted by the Act; ranchers could pass the cost on to others. *Frame*, 885 F.2d at 1137-38. Finally, Congress may have wanted to grant cattle producers the maximum influence in shaping the program and imposed upon them the corresponding financial burdens. *Id.* at 1138. Accordingly, this court rejects plaintiff's equal protection challenge to the Beef Promotion Act.

Given this resolution, the court need not address the remaining arguments of defendant and intervenors. Any arguments of the plaintiff which the court has not specifically addressed herein have been considered and rejected by the court.

IT IS BY THE COURT THEREFORE ORDERED that the motions to dismiss filed by the defendant (Doc. 29, Doc. 112) and the intervenors (Doc. 101, Doc. 110) are hereby granted.

IT IS FURTHER ORDERED that the plaintiff's motions for summary judgment (Doc. 73, Doc. 118, and Doc. 131) are hereby denied.

IT IS FURTHER ORDERED that plaintiff's motion for class certification (Doc. 22) is moot.

IT IS FURTHER ORDERED that the defendant's motion for reconsideration (Doc. 32) is hereby granted. The court hereby sets aside the prior orders (Doc. 5, Doc. 7, Doc. 19, and Doc. 28) which enjoined and stayed the administrative proceedings pending against the plaintiff.

APPENDIX C

149 F.3d 1131

United States Court of Appeals,

Tenth Circuit.

Jerry GOETZ d/b/a Jerry Goetz and Sons, individually and on behalf of others similarly situated, Plaintiff-Appellant,

v.

Dan GLICKMAN, Secretary, United States Department of Agriculture, Defendant-Appellee,

and

Willie Reibel, Rodney and Larry Mense, Jan Lyons, Kansas Livestock Association, National Cattlemen's Association, and National Livestock and Meat Board, Intervenors-Appellees.

No. 96-3120.

July 10, 1998.

David R. Klaassen (Clarence L. King and Brian W. Wood of Hampton, Royce, Engleman & Nelson, L.C., Salina, Kansas, with him on the brief), Marquette, Kansas, appearing for Plaintiff-Appellant.

Douglas N. Letter and Sushma Soni, United States Department of Justice, Washington, D.C., appearing for Defendant-Appellee.

Wayne Watkinson and Richard T. Rossier of McLeod, Watkinson & Miller (John G. Roberts, Jr. and Gregory G. Garre of Hogan & Hartson, L.L.P., Washington, D.C., with them on the brief), Washington, D.C., appearing for Intervenors-Appellees.

Before MURPHY and LOGAN, Circuit Judges, and MILES-LaGRANGE, District Judge.*

MILES-LaGRANGE, District Judge.

Plaintiff Jerry Goetz ("Goetz"), a Kansas cattle farmer, appeals the district court's ruling in favor of Dan Glickman, Secretary, U.S. Department of Agriculture ("Secretary"). Goetz claims the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901(a) ("Beef Promotion Act" or "Act"), is unconstitutional. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Facts and Proceedings Below

Goetz filed this class action lawsuit against the Secretary contending that his and other class members' constitutional rights are being violated because they must pay a $1.00 per head "assessment" on the sale and importation of cattle as authorized by the Beef Promotion Act. The district court's decision provides a succinct description of the Act's regulatory scheme:

> The Act directs the Secretary to promulgate a Beef Promotion and Research Order ("the Order"), that provides for financing beef promotion and research through the assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. § 2901(b), 2903, 2904(8)(A)-(C). The Order established by the Secretary (7 C.F.R. Part 1260, Subpart A) established the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Beef Board") and the Beef Promotion Operating Committee ("the Operating Committee"). 7 U.S.C. § 2904(1)-(7); 7 C.F.R.1260.141,1260.161. The Cattlemen's Beef Board is made of cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141.

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* The Honorable Vicki Miles-LaGrange, United States District Judge of the Western District of Oklahoma, sitting by designation.

> The Board's principal duties are to administer the Order, make rules and regulations to effectuate the terms and provisions of the Order, elect members of the Board to serve on the Operating Committee, to approve or disapprove the budget submitted by the Operating Committee, to receive, investigate and report to the Secretary complaints of violations of the Order, and [to] recommend to the Secretary amendments to the Order. 7 U.S.C. § 2904(2)(A)-(F).

The Operating Committee is composed of ten members of the Cattlemen's Beef Board and ten members elected by a federation of State beef councils. 7 U.S.C. § 2904(4)(A); 7 C.F.R. 1260.161. The Operating Committee develops and submits to the Secretary for approval promotion, advertising, research, consumer information and industry information plans and projects. 7 U.S.C. § 2904(4)(B); 7 C.F.R. 1260.168. The Act prohibits the use of funds for political purposes. 7 U.S.C. § 2904(10).

The Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. § 2904(8)(A) & (C); 7 C.F.R.1260.172 (a)(1), 1260.310. Each person making payment to a cattle producers [sic] for cattle is a "collecting person" who is required to collect the assessments and remit them to a qualified State beef council in the State in which the collecting person resides, or, if there is no qualified State beef council, to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. 1260.311(a), 1260.312(c). Each collecting person must report to the Board certain information for each calendar month at the time the assessments are remitted and must maintain and make available for the Secretary's inspection the records necessary to verify the reports. 7 U.S.C. § 2904(11); 7 C.F.R. 1260.201, 1260.312(a)-(c), 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine if there has been a violation of the Act, the Order, or the rules and regulations

thereunder. 7 U.S.C. § 2909. After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for each violation of the Act and the Order. *Id.* § 2908(a). In addition, the Secretary may request the Attorney General to initiate a civil action to enforce, and to restrain a person from violating, any order or regulation under the Act. *Id.* § 2908(b), (c).

Within 22 months of the issuance of the Order, the Act required the Secretary to conduct a referendum among those persons who were producers and importers during that trial period. The Order would continue to operate only upon approval by a majority of those participating in the referendum. 7 U.S.C. § 2906(a). Prior to the referendum, a cattle producer who paid the assessment could demand a one-time refund. *Id.* § 2907; 7 C.F.R. 1260.173, 1260.174. On May 10, 1988, the referendum was conducted and the Order was approved.

Plaintiff is a "producer" within the meaning of the Act. 7 U.S.C. § 2902(12). As a producer, plaintiff is subject to the one dollar per head assessment upon the sale of cattle. Plaintiff alleges that at times he makes payments to other producers for cattle purchased from such producers, and thus he is a "collecting person" under the Act. *Id.* § 2904(8)(A). As a collecting person, plaintiff is subject to the collecting provisions of the Act and accompanying regulations.

See Goetz v. Glickman, 920 F.Supp. 1173, 1176-77 (D.Kan.1996) (footnote omitted).

On October 29, 1993, the Secretary commenced administrative proceedings against Goetz because he failed to comply with the Beef Promotion Act and pay the assessment. A hearing before an administrative law judge was set for August 8, 1994. On August 2, 1994, Goetz filed a civil action in district court and moved for a temporary restraining order to en-

join the Secretary from proceeding with the administrative hearing. The district court entered a temporary restraining order which expired on August 15, 1994. On August 19, 1994, the parties agreed, with the court's approval, to stay the administrative proceedings until October 1, 1994. As part of the agreement, Goetz agreed to let an accounting firm audit his company. Over the objection of the Secretary, the district court continued the stay throughout the litigation.

Four Kansas cattle producers and three non-profit associations representing cattle producers in Kansas and throughout the nation intervened in the lawsuit to defend the Act.[1] On Dec. 8, 1995, the district court heard oral arguments from the parties.[2] Goetz argued the Act was unconstitutional because it (1) was beyond Congress' power to regulate interstate commerce, (2) imposed an unconstitutional direct tax, (3) effected an impermissible delegation of legislative authority, (4) violated the Takings Clause of the Fifth Amendment, (5) violated the Equal Protection Clause of the Fourteenth Amendment, and (6) infringed on the first amendment rights of cattle producers. He sought a ruling in the district court that the Act is unconstitutional, an injunction against its enforcement, and a refund of assessments he has paid.

On Feb. 28, 1996, the district court upheld the constitutionality of the Act adopting the reasoning of the Third Circuit Court of Appeals in *United States v. Frame,* 885 F.2d 1119 (3d Cir.1989), *cert. denied,* 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990).[3] The district court found that

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[1] In their brief, the intervenors/appellees adopted the arguments made by the Secretary and addressed Goetz' first amendment challenge arguing the Act is not subject to first amendment scrutiny because it is government speech.

[2] The National Pork Producers Council, the American Soybean Association and the National Potato Council filed amicus briefs in the district court.

[3] The plaintiff in *Frame* also challenged the constitutionality of the Beef Promotion Act.

promoting the beef industry is a proper object of legislation under Congress' commerce power because it is reasonably adapted to the goal of strengthening the beef industry. 920 F.Supp. at 1180. The district court also held that the assessment imposed by the Beef Promotion Act is not a tax because the Act does not raise revenue for the government and regulation is the primary purpose of the statute. *See id.* at 1181. The court further held that Congress did not unlawfully delegate its legislative authority to the members of the beef industry because the Act places the Board under the Secretary's authority, Congress sets the amount of the assessments, and the Secretary decides how the funds will be spent. *See id.* at 1182. As to Goetz' takings clause claim, the district court concluded there was no fifth amendment violation because the government is not taking money for private use or to confer a private benefit on private interests (beef groups) in the beef industry. *See id.* Since Congress has determined beef promotion is in the public interest, the district court held courts should not substitute their judgment for Congress'. *See id.*

With regards to Goetz' first amendment claim, the district court agreed with the *Frame* court and found there was no free speech or free association violation because the Act is "commercial speech" not "government speech."[4] The district court concluded that the Act passed the test outlined in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) on the free speech claim.[5] The court also concluded Goetz' first amendment free association claim should be analyzed under

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[4] The district court, like the court in *Frame,* recognized the issue was a close one. *See id.* at 1182.

[5] Restrictions on commercial speech are subject to the test outlined in *Central Hudson:* (1) the State must assert a substantial government interest; (2) the regulatory technique must be in proportion to that interest; and (3) the incursion on commercial speech be designed carefully to achieve the State's goal. 447 U.S. at 564, 100 S.Ct. 2343.

the higher standard of scrutiny set forth in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).[6] 920 F.Supp. at 1182. The district court found the Act's restrictions passed this test because there was only a slight incursion on Goetz' associational rights, the national interest was compelling, the purpose of trying to bolster the beef image was neutral, the Act did not proscribe any official view, and no political funding was authorized by the statute. *See id.* at 1183.

Finally, the district court found there was no equal protection violation. The court held that Congress had a rational basis for enactment of the statute. Specifically, the district court determined that an assessment was easier to administer, ranchers would be the most benefitted by the Act and ranchers could pass any costs incurred on to others, and since Congress gave cattle producers the maximum influence in shaping the program, it rationally decided to pass along the corresponding financial burden to them.[7] *See id.*

The district court (1) granted the motion to dismiss filed by the Secretary and intervenors; (2) denied Goetz' motion for summary judgment; (3) declared Goetz' motion for class certification moot; and (4) set aside its prior orders staying the administrative proceedings. *See id.* at 1184. Goetz appeals the district court's decision and asks this court to de-

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[6] Under *Roberts*, the governmental interference with associational rights must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 468 U.S. at 623, 104 S.Ct. 3244.

[7] The district court also held that because no fundamental right was involved the Equal Protection Clause only required that the classification rationally further legitimate governmental interests. *See id.* at 1183 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 8-12, 112 S.Ct. 2326, 2331-32, 120 L.Ed.2d 1 (1992); *United States v. Phelps*, 17 F.3d 1334, 1344 (10th Cir.1994), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223 (10th Cir.1990)).

clare the Act unconstitutional, give him injunctive relief from the administrative proceedings, and order the return of funds he and other class members paid as assessments under the Beef Promotion Act.

On July 9, 1997, we directed the parties to file supplemental briefs addressing the effect of the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) on Goetz' first amendment claim. In *Wileman Bros.*, the Supreme Court, resolving a circuit split, held the regulations imposing a generic advertising program for California peaches, nectarines, and plums paid for by mandatory assessments on fruit handlers, did not implicate or violate the First Amendment.

Analysis

In this appeal, Goetz raises all of the same claims made in the district court except the unconstitutional delegation of power and taking clause claims. The ruling of the district court is reviewed *de novo*. *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1243-44 (10th Cir.1989) (legal issues are reviewed *de novo*).

Commerce Clause

Goetz first argues the Beef Promotion Act is unconstitutional because it violates the Commerce Clause. He contends (1) the Act does not have a public purpose, (2) the Act does not regulate an activity which substantially affects interstate commerce, and (3) there is no rational connection between the regulatory means selected and the asserted ends. In response, the Secretary argues beef purchases and sales substantially affect interstate commerce. Furthermore, the Secretary argues, the Act, which authorizes promotion and research to strengthen the beef industry and is funded by a regulatory assessment, represents a valid exercise of Congress' commerce power. In addition, the regulation of interstate commerce encompasses promotion as well as prohibition. The Secretary contends promotion and research are reasonably adapted to

the Act's goal of strengthening the market through increased consumption because advertising affects demand.

The United States Supreme Court has clearly defined a court's function in examining Congress' exercise of its power under the Commerce Clause:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution. The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. Moreover, this Court has made clear that the commerce power extends not only to the use of channels of interstate or foreign commerce and to protection of the instrumentalities of interstate commerce or persons or things in commerce, but also to activities affecting commerce. As we explained in *Fry v. United States,* 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975), even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. Thus, when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (internal citations and quotations omitted). *See also State of Oklahoma v. Federal Energy Regulatory Commission*, 661 F.2d 832, 837 (10th Cir.1981), *cert. denied, Texas v. Federal Energy Regulatory Commission*, 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed.2d 1313 (1982); *United States v. Hampshire*, 95 F.3d 999, 1001-1002 (10th Cir.1996), *cert. denied*, 519 U.S. 1084, 117 S.Ct. 753, 136 L.Ed.2d 690 (1997).

In examining the validity of Congress' exercise of power, we begin with the language contained in the Act itself. Congress made the following findings when it passed the Beef Promotion Act:

> (1) beef and beef products are basic foods that are a valuable part of human diet;
>
> (2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;
>
> (3) beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;
>
> (4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;
>
> (5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and

> (6) beef and beef products move in interstate and foreign commerce, and beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

7 U.S.C. § 2901(a).

Congress' purpose and objectives are clearly set forth in the Act:

> It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this Act shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2901(b).

Goetz first contends that beef production does not substantially affect interstate commerce.[8] For congressional exercise of power to be valid under the commerce clause, the legislation must involve an activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 1630, 131 L.Ed.2d 626 (1995) (Court struck down the Gun Free School Zone Act of 1990 enacted under the commerce clause because it had nothing to do with any

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[8] Goetz contends the Act is unconstitutional because it does not have a public purpose. Essentially, he argues the Act's primary purpose is to raise revenue, therefore it is a direct tax impermissibly levied upon him. *See* Brief of Appellant at 31. As set forth below, we hold the Act's primary purpose is to regulate, therefore it is not a tax.

sort of economic enterprise). As the district court noted, "It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause." 920 F.Supp. at 1179. We also conclude Congress had a rational basis for finding the beef industry substantially affects interstate commerce.

Goetz also argues Congress really intended to regulate advertising. However, the plain language of the statute reveals the purpose of the Act is to strengthen the beef industry and we conclude this is a legitimate congressional goal. We further conclude the objective of the Act is valid and the stimulation of the beef market is a proper regulatory activity.

Goetz contends Congress' commerce power is limited to restricting or prohibiting an activity.[9] We agree with the well reasoned opinion of our sister circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir.1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990). The Third Circuit said, "[I]t is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." *Id.* at 1126. The Act regulates commerce by authorizing the collection of an assessment that is used to promote and advertise beef. The Supreme Court has recognized that advertising stimulates consumer demand for the product being promoted. *See Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986). The court in *Frame* also rejected the argument that the Act is not regulatory noting that Congress chose to promote and stimulate the demand side of the beef market indirectly, by influencing consumer attitudes toward beef. 885 F.2d at 1126. The *Frame* court likewise rejected Goetz' argument that the Act is unconstitutional because no

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[9] Goetz contends Congress does not have the power to "stimulate and promote" commerce since Congress' power is limited to a) leaving the activity alone; b) restricting the activity; or c) prohibiting the activity.

activity is being regulated. The court stated: "[W]e decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the 'activity' of 'consumer beef purchases,' 'interstate beef sales,' or 'national beef markets.' Each activity is related, and is validly regulated by Congress." *Id.* at 1127.

Goetz also contends there is no rational connection between the regulatory means selected and the asserted end. Goetz contends since the government has set up a pork promotion and research board (among others), and pork is the primary competitor of beef, it is not reasonable for the Secretary to engage in conflicting programs. In addition, Goetz argues the Act does not serve its stated purpose to regulate beef and Congress is actually trying to regulate advertising.

In considering this argument, the *Frame* court stated: "To stimulate the demand for beef, the lack of which Congress has determined is harming the beef industry, Congress has chosen from its arsenal of regulatory means promotion and advertising, research, consumer information and industry information. These endeavors are rationally related to the maintenance and expansion of the nation's beef markets." *Id.* The *Frame* court found that the Act was a valid exercise of Congress' power to regulate interstate commerce. *See id.* We agree. Goetz' argument that the promotion of beef is offset by other promotion schemes such as for pork is without merit. We hold Congress has a rational basis for stimulating different areas of the agricultural economy and determining its various promotional programs are in the best interest of the public.

In sum, we conclude that under current Supreme Court precedent, Congress has validly exercised its commerce powers in enacting the Beef Promotion Act.

Direct Tax

Goetz also argues the assessment is a direct tax that must be apportioned uniformly among the states to be constitutional under the Taxing Clause because the Act's primary

purpose is to raise revenue. Goetz argues the Act is a direct tax and relies on legislative history to support his contention Congress never intended it to be a regulatory program. Goetz contends the assessments flow to qualified beef councils and national private trade associations in the beef industry.

The Secretary argues the Apportionment Clause is inappropriate because Congress clearly intended to exercise its authority under the Commerce Clause. The Secretary contends assessment is not the objective of the Act but merely a funding mechanism for the promotion of the beef industry and research. The Secretary further argues the assessment is not a tax but is like a "special assessment" imposed on convicted criminals under the Victims of Crimes Act, or mandatory bar dues or union dues. Finally, the Secretary points out that Goetz has no evidence that the assessment is a direct tax.

The test for determining whether an assessment is a tax has been clearly enunciated by the Sixth Circuit Court of Appeals:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Rodgers v. United States, 138 F.2d 992, 994 (6th Cir.1943). *See also Chickasaw Nation v. State ex rel Oklahoma Tax Commission,* 31 F.3d 964, 968 (10th Cir.1994) (quoting *American Petrofina Co. of Texas v. Nance,* 859 F.2d 840, 841 (10th Cir.1988) ("[t]he mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised.")). We agree with the district court

that the primary purpose of the Act is regulation, not to raise revenues.

First Amendment

Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption.[10] Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef).

The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of unions or integrated bars. Furthermore, the Secretary and intervenors argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."

This Court agrees with the Secretary and intervenors. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), involved a First Amendment challenge to a generic advertising program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit in *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.

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[10] The $1.00 per head assessment on the sale and importation of cattle funds the Operating Committee's activities, which include the promotion of the beef industry throughout the country through "generic advertising." The generic advertisements include the familiar "Beef, it's what's for dinner" promotion.

In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers to endorse or to finance any political or ideological views. *See id.* at 2138. The Supreme Court found its compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*

The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.

In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson.* The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and

association. *Goetz v. Glickman*, 920 F.Supp. at 1182-83. We find the district court erred in applying the *Central Hudson* test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n. 5 (10th Cir.1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Equal Protection

Finally, Goetz contends the assessment violates the Equal Protection Clause because it infringes on his First and Fifth amendment rights. Therefore, he argues, the Act must be reviewed under strict scrutiny to determine whether the statute is narrowly tailored to further a compelling governmental interest. Goetz argues the Act unfairly burdens producers, importers and collecting persons while benefitting the entire beef industry. Goetz also contends Congress' interests in preserving the American cattlemen's traditional way of life and avoiding the free rider problem are not compelling or substantial governmental interests. Goetz further argues the refund provisions of the Act suggest the government's interest is not compelling or substantial. Goetz contends there are numerous less restrictive means available to Congress as evidenced by the legislative discussions.[11]

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[11] Goetz contends his fundamental rights under the First and Fifth Amendments have been infringed and therefore strict scrutiny applies. In addition, Goetz contends that the Beef Promotion Act is presumed to be unconstitutional for the purposes of analysis of his First and Fifth Amendment claims. However, we conclude Goetz' claims must be analyzed under the rational basis test and the Act, therefore, is presumptively constitutional and the burden falls on Goetz to show that the Act is irrational or arbitrary and cannot further a legitimate governmental interest. *See United States v. Phelps*, 17 F.3d 1334, 1345 (10th Cir.1994), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994). In his appellate brief, Goetz fails to address his equal protection claim under the rational basis test, arguing only the strict scrutiny standard of review.

In response, the Secretary argues the failure of Goetz' First Amendment claim dooms his equal protection challenge as well. Since he does not allege a suspect class, the Secretary contends the strict scrutiny standard of review does not apply. Furthermore, the Act does not infringe on Goetz' equal protection rights because it makes an economic distinction and need only be rationally related to a legitimate governmental interest. The Secretary argues the Act easily survives the rational basis test because Congress has a compelling interest in strengthening the beef industry. In addition, the Secretary argues, Congress also rationally decided the members of the industry that have the most to gain should bear the economic costs involved.

The Fifth Amendment's Equal Protection Clause prohibits the federal government from discriminating between individuals or groups. Government classification that actually jeopardizes the exercise of a fundamental right or a suspect class (race, gender, etc.) must be reviewed under a strict scrutiny standard and must be precisely tailored to further a compelling governmental interest. *Edwards v. Valdez,* 789 F.2d 1477, 1483 (10th Cir.1986). If no suspect class or fundamental right is involved, the Equal Protection Clause only requires that the classification rationally further a legitimate governmental interest. *See Nordlinger v. Hahn,* 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *O'Connor v. City and County of Denver,* 894 F.2d 1210, 1223-24 (10th Cir.1990).

We agree with the district court's determination that the Act does not violate Goetz' First and Fifth Amendment rights, and the strict scrutiny standard of review does not apply. Although Goetz failed to address his equal protection claims under the rational basis test, the court in *Frame* identified several rational bases for Congress' enactment of the statute: (1) an assessment on the initial sale of cattle is easier to administer; (2) ranchers would be most benefitted by the Act; and (3) ranchers could pass the cost on to others. *Frame,* 885

F.2d at 1137-38. This Court finds the Act easily survives Goetz' equal protection challenge as well.

Conclusion

The judgment of the district court is AFFIRMED in all respects on Goetz' Commerce Clause, Taxing Clause and Equal Protection Clause claims. The district court's decision is AFFIRMED on Goetz' first amendment claims under the reasoning of the Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).

APPENDIX D

56 Agric. Dec. 1470, 1997 WL 730378 (U.S.D.A.)

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

	)	BPRA Docket No. 94-0001
	)	
Jerry Goetz, d/b/a	)	
Jerry Goetz and Sons,	)	
	)	
Respondent	)	**Decision and Order**

The Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations (7 C.F.R. § 1260301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on October 29, 1993.

The Complaint alleges that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent]: (1) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required reports (Compl. ¶ II(A)); (2) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201)

and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit necessary information in required reports (Compl. ¶ II(B)); and (3) willfully violated section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) by failing to remit the assessments due for the purchase and sale of cattle (Compl. ¶ III(A)-(L)). Complainant requests the issuance of an order or orders as authorized under the Beef Promotion Act, including an order requiring Respondent to cease and desist from violating the Beef Promotion Order and Beef Promotion Regulations and assessing civil penalties against Respondent in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 4-5).

On December 10, 1993, Respondent filed an Answer denying the material allegations of the Complaint and contending that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer ¶¶ 2-4). Respondent requests denial of the relief requested in the Complaint and a determination and declaration that the Beef Promotion Act is unconstitutional, void, and unenforceable; and the Beef Promotion Order and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer at 1-2).

On August 2, 1994, Respondent filed an action in the United States District Court for the District of Kansas seeking a temporary restraining order to prevent a hearing from being held in this proceeding. The court issued an order requiring an audit by the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas, of Respondent's books and records pertaining to his raising, buying, selling, and trading of cattle and Respondent's collection of monies, if any, under the Beef Promotion Act and enjoined the instant proceeding pending the completion of the audit of Respondent's books

and records (Complainant's Findings of Fact Conclusions of Law and Brief in Support Thereof [hereinafter Complainant's Findings of Fact], Exhibit A). On August 4, 1994, Respondent filed a Complaint in United States District Court for the District of Kansas challenging the constitutionality of the Beef Promotion Act. The court stayed the instant proceeding pending a decision regarding Respondent's constitutional challenges to the Beef Promotion Act. The audit was completed on November 23, 1994 (CX 18 at 5), and the court issued a decision on February 28, 1996, in which the court rejected each of Respondent's constitutional challenges to the Beef Promotion Act and set aside prior orders which enjoined and stayed this proceeding. *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

On September 25 and 26, 1996, Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing in Wichita, Kansas. Sharlene A. Deskins, Esq., represented Complainant. David R. Klaassen, Esq., of Marquette, Kansas, and Clarence L. King, Jr., Esq., of the law firm of Hampton, Royce, Engleman & Nelson, represented Respondent.

On January 8, 1997, Complainant filed Complainant's Findings of Fact. On January 13 and 16, 1997, Respondent filed Respondent's Brief. On February 26, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent failed to collect assessments and remit assessments to a State Cattlemen's Beef Promotion and Research Board for 22,118 cattle during the period October 1, 1986, through June 30, 1994, in violation of section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and .312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) (Initial Decision and Order at 1314); (2) ordered Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations

(Initial Decision and Order at 14); (3) assessed a civil penalty of $46,624 against Respondent (Initial Decision and Order at 14); and (4) ordered Respondent to pay past-due assessments and penalties to the Kansas Beef Council in the amount of $68,742 (Initial Decision and Order at 14).

On April 7, 1997, Respondent filed an appeal to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557.[1] On June 6, 1997, Complainant filed Complainant's Opposition to the "Petition Appealing Decision and Order of Administrative Law Judge James W. Hunt Dated February 26, 1997, to the Judicial Officer, Combined With Supporting Brief"; Complainant's Appeal and Brief in Support Thereof [hereinafter Complainant's Appeal Petition], and on August 18, 1997, Respondent filed Respondent's Response and Opposition to Complainant's Opposition and Appeal Combined With Supporting Brief [hereinafter Respondent's Opposition to Complainant's Appeal Petition]. On August 18, 1997, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which, in accordance with section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused because the issues have been fully briefed by Complainant and Respondent and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, except that: (1) I find erroneous the ALJ's determination that section 1260.175 of the Beef Pro-

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

motion Order (7 C.F.R. § 1260.175) is a method for determining the civil penalty to be assessed; thus, I assess a civil penalty in an amount different than that assessed by the ALJ; (2) I conclude that Respondent failed to transmit 93 reports of assessments to the Kansas Beef Council in willful violation of the Beef Promotion Order and the Beef Promotion Regulations; and (3) I find that Respondent failed to remit assessments for 21,423 head of cattle in willful violation of the Beef Promotion Order and the Beef Promotion Regulations; thus, I order Respondent to pay the Kansas Beef Council assessments and late payment charges in amounts different than those ordered to be paid by the ALJ. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law. Complainant's exhibits are designated by the letters "CX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

APPLICABLE STATUTES AND REGULATIONS

7 U.S.C.:

CHAPTER 62-BEEF RESEARCH AND INFORMATION

§ 2901. Congressional findings and declaration of policy

(a) Congress finds that–

. . .

(2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;

. . .

(4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation[.]

. . .

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this chapter shall be construed to limit the right of individual producers to raise cattle.

§ 2902. Definitions

For purposes of this chapter–

. . .

(3) the term "Board" means the Cattlemen's Beef Promotion and Research Board established under section 2904(l) of this title;

. . .

(14) the term "qualified State beef council" means a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State;

. . .

(16) the term "Secretary" means the Secretary of Agriculture[.]

§ 2904. Required terms in orders

. . .

(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

§ 2908. Enforcement

(a) Restraining order; civil penalty

If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may –

(1) issue an order to restrain or prevent a person from violating an order; and

(2) assess a civil penalty of not more than $5,000 for violation of such order.

7 U.S.C. §§ 2901(a)(2), (4), (b), 2902(3), (14), (16), 2904(8)(A), 2908(a).

110 Stat.:

TITLE V-AGRICULTURAL PROMOTION

Subtitle A-Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.-In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes-

. . .

(5) Public Law 94-294 (7 U.S.C. § 2901 et seq.)[.]

. . .

(b) FINDINGS.-Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural com-

modity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion program established and funded by the commodity promotion laws to replace the individual. advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture-

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those program that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501(a)(5), (b)(1)-(9), 110 Stat. 888, 1029-31 (1996).

7 C.F.R.:

PART 1260-BEEF PROMOTION AND RESEARCH

SUBPART A-Beef Promotion and Research Order

DEFINITIONS

. . .

§ 1260.102 Secretary.

"Secretary" means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in the Secretary's stead.

§ 1260.103 Board.

"Board" means the Cattlemen's Beef Promotion and Research Board established pursuant to the Act and this subpart.

. . .

§ 1260.106 Collecting person.

"Collecting person" means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

. . .

§ 1260.115 Qualified State beef council.

"Qualified State beef council" means a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information program ; and that is certified by the Board pursuant to this subpart as the beef promotion entity in such State.

. . .

§ 1260.128 Act.

"Act" means the Beef Promotion and Research Act of 1985, Title XVI, Subtitle A of the Food Security Act of 1985, Pub. L. 99-198 and any amendments thereto.

. . .

ASSESSMENTS

§ 1260.172 Assessments.

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall col-

lect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

. . .

REPORTS, BOOKS AND RECORDS

§ 1260.201 Reports.

Each importer, person marketing cattle, beef or beef products of that person's own production directly to consumers, and each collecting person making payment to producers and responsible for the collection of the assessment under § 1260.172 shall report to the Board periodically information required by regulations prescribed by the Board and approved by the Secretary. Such information may include but is not limited to the following:

(a) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transaction;

(b) The number of cattle imported; or the equivalent thereof of beef or beef products;

(c) The amount of assessment remitted;

(d) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and,

(e) The date any assessment was paid.

. . .

SUBPART B-Rules and Regulations

. . .

§ 1260.311 Collecting persons for purposes of collection of assessments.

Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be:

(a) Except as provided in paragraph (b) and (c) of this section, each person making payment to a producer for cattle purchased in the United States shall collect from the producer an assessment at the rate of $1.00 per head of cattle purchased and shall be responsible for remitting assessments to the qualified State beef council or the Cattlemen's Board as provided in § 1260.312. The collecting person shall collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. The person paying the producer shall give the producer a receipt indicating payment of the assessment.

. . .

(c) In the States listed below there exists a requirement that cattle be brand inspected by State authorized inspectors prior to sale. In addition, when cattle are sold in the sales transactions listed below in those States, these State authorized inspectors are authorized to, and shall, collect assessments due as a result of the sale of cattle. In those transactions in which inspectors are responsible for collecting assessments, the person paying the producer shall not be responsible for the collection and remittance of such assessments. The following chart identifies the party responsible for collecting and remitting assessments in these States:

. . .

[Nebraska Country Sales (country sales include any sale which is not conducted at an auction or livestock

market and which is not a sale to a slaughter/packer, feedlot, or an order buyer or dealer) - The brand inspector has responsibility to collect; however, when there has not been a physical brand inspection, the person paying the producer shall be the collecting person and has the responsibility to collect and remit assessments due.]

. . .

§ 1260.312 Remittance to the Cattlemen's Board or Qualified State Beef Council.

Each person responsible for the collection and remittance of assessments shall transmit assessments and a report of assessments to the qualified State beef council of the State in which such person resides or if there is no qualified State beef council in such State, then to the Cattlemen's Board as follows:

(a) *Reports.* Each collecting person shall make reports on forms made available or approved by the Cattlemen's Board. Each collecting person shall prepare a separate report for each reporting period. Each report shall be mailed to the qualified State beef council of the State in which the collecting person resides, or its designee, or if there exists no qualified State beef council in such State, to the Cattlemen's Board. Each report shall contain the following information:

(1) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transactions;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and

(4) The date any assessment was paid.

(b) *Reporting periods.* Each calendar month shall be a reporting period and the period shall end at the close of business on the last business day of the month.

(c) *Remittances.* The remitting person shall remit all assessments to the qualified State beef council or its designee, or, if there is no qualified State beef council, to the Cattlemen's Board at P.O. Box 27-275; Kansas City, Missouri 64180-0001, with the report required in paragraph (a) of this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen's Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen's Board. All remittances shall be received subject to collection and payment at par.

. . .

§ 1260.314 Certification of non-producer status for certain transactions.

(a) The assessment levied on each head of cattle sold shall not apply to cattle owned by a person:

(1) If the person certifies that the person's only share in the proceeds of a sale of cattle, beef, or beef products is a sales commission, handling fee or other service fee; or

(2) If the person:

(i) Certifies that the person acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party[;]

(ii) Establishes that such cattle were resold not later than 10 days from the date on which the person acquired ownership; and

(iii) Certifies that the assessment levied upon the person from whom the person purchased the cattle, if an assessment was due, has been collected and has been remitted, or will be remitted in a timely fashion.

. . .

§ 1260.315 Qualified State Beef Councils.

The following State beef promotion entities have been certified by the Board as qualified State beef councils:

. . .

Kansas Beef Council

. . .

Nebraska Beef Industry Development Board

7 C.F.R. §§ 1260.102, .103, .106, .115, .128, .172(a)(1), .201, .311(a), (c), .312, .314(a), .315.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER AS MODIFIED

. . . [Footnote 1 omitted.]

Statement of the Case

Respondent ... has been in the cattle buying business in Kansas since 1949 [(Tr. 259)]. He does some farming and does his cattle buying and selling as the owner and operator of Jerry Goetz and Sons (Tr. 260). He visits a different sale barn each day, where he buys and sells cattle. He keeps some cattle at his feedlot, but often promptly resells the cattle he buys. "We buy some cattle for the feedlot. We swap a lot of cattle that I buy at one sale barn and move them to the next barn. That is basically what I do." [(Tr. 260.)] Respondent buys up to 200 cattle a day (Tr. 260-64).

The Complaint alleges that Respondent failed to remit assessments required by the Beef Promotion Order for cattle he purchased [and sold from] 1986 [through] October 29, 1993, the date ... the Complaint [was filed].

The [collection of assessment provisions of the] Beef Promotion Order, promulgated pursuant to the Beef Promotion Act, became effective October 1, 1986. The Beef Promotion Order requires that $1.00 be assessed for each head of cattle [purchased]. The money is used to promote beef and beef products. The Beef Promotion Order requires that the assessment be collected by the "collecting person" in the transaction [(7 C.F.R. § 1260.172(a)(1)). The Beef Promotion Order] defines "collecting person" as the person "making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment" (7 C.F.R. § 1260.106). The collected money is to be remitted by the collecting person to [a qualified] State ... beef [council] (in this instance, to the Kansas Beef Council for cattle purchased in Kansas). The assessment, deducted from the money the purchaser pays to the seller, is commonly referred to as a "checkoff."

Complainant alleges that Respondent failed to remit assessments as the "collecting person" in [transactions involving] over 24,000 cattle . . . .

Respondent's alleged failure to remit assessments was first brought to his attention in June 1987 in a letter to him from the Kansas Beef Council (CX 12). The letter states:

> June 1, 1987
>
> Jerry Goetz & Sons
> P.O. Box 26
> Park, KS 67751
>
> Dear Mr. Goetz:
>
> The Kansas Beef Council has been informed by producers selling cattle to you that you have collected from them a $1.00 per head assessment on cattle sold to you.

The Kansas Beef Council has not received remittance of those dollars from you.

This is to remind you of that as of October 1, 1986 you are required by the Beef Promotion and Research Act to collect from producers and remit to the Kansas Beef Council!'$1.00 per head on all cattle purchased. Failure to do so may result in a civil penalty.

If you have any questions or require further information regarding this program, please contact Ms. Renee Wassenberg at (913) 232-4834.

Sincerely,
/s/
Renee Wassenberg
Manager

In February and June 1992 the Kansas Beef Council again sent Respondent letters concerning his alleged failure to comply with the Beef Promotion Order (CX 13, 14).

On August [19], 1994, as a result of legal action [instituted by Respondent to stay this proceeding, the United States District Court for the District of Kansas] ordered that [the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas, conduct] an audit ... of Respondent's [books and] records to determine his compliance with the Beef Promotion Order [(Complainant's Findings of Fact, Exhibit A)]. Darrell D. Loyd, a certified public accountant [and partner in the accounting firm of Wendling, Noe, Nelson & Johnson,] conducted the audit which he completed on November 23, 1994, and which is entitled "[Kansas Beef Council] Compliance Report [for Jerome (Jerry) Goetz October 1, 1986 Through June 30, 1994]" [hereinafter Compliance Report] (CX 18). Mr. Loyd examined Respondent's purchase invoices, sale invoices, canceled checks, deposit slips, and nonproducer status forms to determine the head count for cattle that Respondent purchased and for which he should have

collected and remitted assessments. Mr. Loyd estimated the number of cattle involved in the transactions from October 1, 1986, to December 31, 1989, a period for which Respondent no longer had records, by using the average sales for the period January 1, 1990, to June 30, 1994, a period for which Respondent had records ([CX 18 at 2;] Tr. 162-63). Mr. Loyd estimated in the Compliance Report that Respondent had failed to remit assessments in transactions involving 24,672 head of cattle between October 1, 1986, and June 30, 1994. Mr. Loyd determined that Respondent owes $24,672 in assessments and a [late payment charge] of $51,847.48 (CX 18 at 4, 8).

Complainant seeks an order requiring Respondent to pay these [unremitted assessments and accrued late payment charges, totaling $76,519.48, to the Kansas Beef Council] and to pay a [civil] penalty of $80,000 [to the Treasurer *of* the United States (Complainant's Findings of Fact at 17-18)].

Discussion

Respondent contends that the Beef Promotion Act and Beef Promotion Order [are] unconstitutional and that, if he is required to pay assessments, he should not have to pay on the 1,170 head of cattle that the auditor agreed at the hearing were not subject to an assessment, that the records showing that he collected but failed to remit assessments for other transactions are erroneous, that some sates were exempt from assessments, and that Complainant is precluded from going back further than 1990 to make claims for alleged unremitted assessments.

. . .

At the hearing, the auditor, Darrell Loyd, testified that on further review of the records, including those that he had not reviewed during his audit, approximately 1,170 head of cattle involved in transactions between January 1, 1990, and June 30, 1994, that he included in his audit as being subject to assessment could be excluded from the total number of cattle

for which Respondent should have remitted assessments (Tr. 343). Complainant argues that the 1,170 [cattle] should still be included in the count because some of the records on which Mr. Loyd based his determination were presented to him for the first time at the hearing and that Respondent had therefore failed to comply with the [United States district] court's order to submit all the records to the auditor. Respondent's wife, Alice Goetz, who keeps records for Respondent, testified that the documents reviewed by the auditor were prepared on the dates indicated and that no substantive changes had been made to them (Tr. 313). The auditor did not question the authenticity of these documents and said that they may have been presented to him during the audit but that he had not matched them up before the hearing (Tr. 343). I find that the documents, whether submitted in compliance with the [United States district] court order or not, are authentic and relevant and that assessments do not have to be remitted on 1,170 head of cattle. Assessments also do not have to be remitted for the 30.5 head of cattle that the auditor estimated that Respondent had purchased from an "F. Chapman" on 1/12/91 (CX 18 at 10). [Mrs. Goetz] testified that the check memo for this purchase, which she signed, shows that the purchase was for 7,699.45 bushels of corn rather than for cattle (RX 35; Tr. 286-87). Likewise, the check to ["F.] Chapman["] on 3/26/94 (RX 166), rather than being payment for what the auditor estimated was 174.1 head of cattle (CX 18 at 15), was instead payment for corn.

A check reflecting a transaction between Respondent and "J. Hartman" on 5/20/91 (RX 58) is too vague to support the auditor's conclusion that it reflects a purchase of an estimated 7.3 head of cattle (CX 18 at 10). Another check, for a transaction with an "M. Bechman" on 12/14/93 (RX 154), states that it was for "machine hire" rather than for the purchase of what the auditor estimated was 9.6 head of cattle (CX 18 at 14). Two checks payable to "D. Goetz" on 12/14/93 (RX 153, 155) appear to reflect, as Respondent contends, an overpay-

ment for cattle, rather than, as the auditor found (CX 18 at 14), an estimated purchase, respectively, of 21.1 and 21.7 head of cattle.

Respondent contends, in regard to his purchase of 228 head of cattle from Scott Clements in Nebraska on 2/22/92, that, contrary to the auditor's determination, he did not collect an assessment from Mr. Clements for these cattle and that he was also not the collecting person for the transaction because it occurred in Nebraska. Mr. Clements, however, testified that ... Respondent's truck driver [deducted] $1.00 a head [from the purchase price of the] cattle ... and [that he, Mr. Clements,] was told that Respondent "would take care of the checkoff." (Tr. 11, 28-30.) Respondent first denied collecting an assessment from Mr. Clements (Tr. 271), but then equivocated as follows:

> BY MS. DESKINS:
>
> Q. Okay. Are you saying that when this [sic] cattle was purchased from Mr. Clements, no checkoff money was deducted?
>
> [BY MR. GOETZ:]
>
> A. I don't know. It wasn't my responsibility.

Tr. 283.

I find Respondent's denial to be too equivocal to be credible, but that Mr. Clements' testimony was credible that Respondent through his agent collected an assessment on the 228 head of cattle he bought from Mr. Clements.... [However,] section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) provides that, in Nebraska, a brand inspector instead of the purchaser shall be the collecting person if there has been a [physical] brand inspection. Otherwise, the "person paying the producer" is the collecting person. [As discussed in this Decision and Order, *infra*, pp. 51-58, the evidence establishes that a brand inspector was present during the February 22, 1992, transaction between Respondent and Mr. Clements, and I infer, based on Mr. Clements' testi-

mony, that there was a physical brand inspection. Therefore, in accordance with section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)), the brand inspector was the collecting person for this transaction.]

Respondent further contends that many of Respondent's cattle transactions were "private treaty sales" which are sales between producers. In these transactions, Respondent argues, both the seller and the buyer are liable for the collection and remittance of the assessment and that Complainant, by attempting to collect assessments from Respondent, may be trying to collect twice for the same transactions since Complainant has not proven that the cattle sellers have not paid the assessments. Complainant, however, has shown that Respondent was the "collecting person" as defined by section 1260.106 of the [Beef Promotion Order (7 C.F.R. § 1260.106)] since Respondent was "the person making payment to a producer" in these transactions. As the collecting person, Respondent was responsible under the Beef Promotion Order for collecting and remitting the assessment regardless of whether the transactions were private treaty sales. Complainant has therefore established its *prima facie* case that Respondent either collected or should have collected assessments involving transactions in which he was the collecting person and that he did not remit such assessments. [Once Complainant has established its *prima facie* case], it is Respondent's burden to rebut Complainant's case by showing that [Respondent] was not responsible for the assessments in these ... private treaty sales [based upon the payment of the assessments] . . by the sellers. Respondent has not done so.

[Section 1260.314(a)(2)(ii) of the Beef Promotion] Regulations [(7 C.F.R. § 1260.314(a)(2)(ii))] provides that assessments do not have to be collected if the person buying the cattle establishes that the cattle were resold not later than 10 days from the date on which, [the person acquired ownership]. Respondent contends that the auditor erred in finding that Respondent had held cattle more than 10 days before

selling them and that this error was caused by Mrs. Goetz' record keeping. The auditor had determined sale dates by relying on the sale invoices prepared by Mrs. Goetz. Her practice, she said, was to write on the invoices the date she prepared them rather than the actual date the cattle were resold. She testified that she was sometimes over a week late in preparing the invoices (Tr. 364-65). Respondent contends that, because of Mrs. Goetz' delay in preparing the invoices, many cattle were resold within the 10-day period even though the invoices show a later date. He maintains that the feedlot records for the cattle also indicate that resales occurred earlier than the dates appearing on the invoices. [Respondent] cites as an example 66 cattle that he bought at Norton Livestock [Auction, Inc.,] on January 7, 1993, and then sold to "D. Goetz." (RX 117; Tr. 371-72.) The invoice date for the sale to D. Goetz [is] January 2[0], 1993, but Respondent contends that the cattle were resold before January 2[0, 1993]. A feedlot computer printout for February 1993 shows that, as of the date of the printout, D. Goetz owned the cattle and that they had been "on feed" for 49 days at the feedlot (RX 119, 120, 126; Tr. 371-73).

Respondent argues that the feedlot record shows that title to the cattle was transferred to D. Goetz "[w]hen they hit the lot" which would have been sometime around January [10, 1993] (Tr. 375[-76]). Mrs. Goetz also testified that the feedlot record reflects cattle ownership and that Respondent usually resold cattle within a week after buying them, sometimes the next day (Tr. 389-90). However, this was not [Respondent's] invariable practice. He referred to the cattle he resells soon after buying them as "swap" cattle, but he testified that he also keeps some cattle for 30 or more days after buying them (Tr. 260, 264-65). Mr. Loyd, the auditor, testified that he relied on Respondent's sale invoices rather than the feedlot records to determine resale dates because he found that the feedlot records contained conflicting information and that it is the practice of auditors to rely on sale invoices to determine

when title to cattle changes (Tr. 422). Mrs. Goetz also testified that she did not prepare the feedlot records, that she was not actually familiar with them, and that she could not reconcile the differences appearing on these records (Tr. 396-98). Respondent, moreover, did not offer the testimony of the person or persons who prepared the feedlot records to explain the information on them or how ... the actual dates that cattle were bought or sold [can be determined from the feedlot records]. The feedlot record for the cattle sold to D. Goetz shows that the cattle had been at the feedlot for 49 days (RX 126), thus indicating that they had been there since about January 10[, 1993]. However, this does not necessarily show that the [cattle] were actually owned by D. Goetz since th[e date that the cattle had been in the feedlot] and the feedlot record does not otherwise provide a sale date.

Mrs. Goetz' testimony that she sometimes inadvertently used an incorrect sale date on some invoices is credible, but, even so, she did not testify that all sale invoices had a wrong sale date or that the January 2[0, 1993] date for the sale to D. Goetz was incorrect. While one might infer, in the absence of other evidence, that January 10[, 1993,] was the date that Respondent sold the cattle to D. Goetz, this inference fails in the face of the much stronger direct evidence presented by Respondent's sales invoice showing that the cattle were sold on January 2[0], 1993. I find that the sale dates appearing on Respondent's sale invoices, relied on by the auditor in determining that cattle were resold more than 10 days after their purchase, were the presumptive sale dates in the absence of evidence showing, in specific instances, that such dates were incorrect. Respondent has therefore failed to establish that, except for the following transactions, he resold cattle within 10 days of purchasing them.

As to an estimated 106 head of cattle that the auditor found had been held by Respondent more than 10 days before selling them at Syracuse Sale [Company] on 12/16/91 (CX 18 at 18), Respondent has established that these cattle were re-

sold within the 10-day period. The resale date the auditor determined as 12/16/91 was based on a deposit slip dated Monday, 12/16/91 (RX 69). However, Mrs. Goetz testified that sales at Syracuse [Sale Company] take place on Friday and that the deposit slip therefore reflects the sale of cattle on the Friday before she made the deposit, which means the sale would have been on Friday, 12/13/91 (Tr. 351-55). She said that these cattle sold at Syracuse [Sale Company] included those that Respondent had bought at Hays Livestock [Market Center, Inc.,] on 12/4/91, at Oakley Livestock [Commission Co., Inc.,] on 12/7/91, and at Wakeeney Livestock [Commission Company] on 12/10/91 (RX 66, 67, 68). She testified that this could be determined by the abbreviations that Respondent wrote on the purchase invoices at the time he bought them to direct where the cattle were to be sent. The purchase invoices for these cattle indicate with an "S" or a "Syr" the cattle that were destined for the Syracuse Sale [Company] (Tr. 357-58). Thus, [Respondent established that] the 106 head of cattle were [resold] at Syracuse [Sale Company] on 12/13/91, [not later than 10 days from the date on which Respondent acquired ownership of the cattle].

Respondent contends that assessments also are not due for those "swapping" transactions set forth on page 29 of the Compliance Report (CX 18 at 29), because, as the auditor conceded at the hearing (Th 424), the cattle were resold within 10 days [from the date on which Respondent acquired ownership of the cattle]. The auditor, however, determined that Respondent should have remitted assessments for these cattle because, regardless of whether these cattle were resold within the 10-day period, the records for these transactions ("Certification of Non-Producer Status" forms), show that Respondent had collected assessments on the cattle. The forms, signed by Respondent, certify that "I collected $1.00 per head." (CX 2-4, 7, 9.)

Bryce Schumann, the Coordinator of Industry Relations for the Kansas Beef Council, oversees the collection of the

assessments in Kansas. He testified that all money collected as assessments on cattle transactions are to be remitted to the [Kansas Beef] Council:

> BY MS. DESKINS:
>
> Q. Is it the general practice when someone collects assessments that they are going to submit to the Qualified State Beef Board or the Beef Board itself?
>
> [BY MR. SCHUMANN:]
>
> A. It is their [sic] responsibility of the collecting person to forward that to the Kansas Beef Council, yes, it is.
>
> Q. Has Mr. Goetz ever submitted any assessments to the Kansas Beef Council?
>
> A. No, he has not.

Tr. 138.

Respondent argues that he did not collect these assessments despite his signed statements. He claims he signed only blank forms at sale barns and that his certification on the non-producer status forms that he collected the assessments is therefore an error ... [and Mr. Loyd testified that Respondent sold the 174 cattle listed on page 29 of the Compliance Report (CX 18 at 29) not later than 10 days from the date on which Respondent acquired ownership of the cattle. I find, based on Respondent's and Mr. Loyd's testimony that Respondent has established that he resold these 174 head of cattle not later than 10 days from the date on which he acquired ownership of the cattle. Therefore, Respondent is not required under the Beef Order and Beef Regulations to pay assessments for the 174 head of cattle listed on page 29 of the Compliance Report (CX 18 at 29).]

Finally, Respondent contends that Complainant is precluded from going back more than 3 years to require him to pay assessments. Respondent's argument is based on [the Collection - Compliance Reference] Guide [prepared by the

compliance manager for the Cattlemen's Beef Promotion and Research Board] in 1993 which provides that [collecting] persons subject to the Beef Promotion Order [must maintain records and documentation pertaining to the checkoff for at least] 3 years [following each transaction] (RX 169[at 5; Tr. 241-42]). The guide, however, is not a rule or regulation binding on Complainant's enforcement proceedings. Neither [the Beef Promotion Act,] the Beef Promotion Order, nor the Beef Promotion Regulations provides for any ... limitation [on the time within which an action may be instituted to collect unremitted assessments and late payment charges, assess civil penalties, and issue a cease and desist order]. Complainant may therefore seek [to collect unremitted assessments and late payment charges] from the effective date of the Beef Promotion Order to June 30, 1994[, and seek a cease and desist order and the assessment of a civil penalty based on violations from the effective date of the Beef Promotion Order to June 30, 1994].[2]

Thus, for the period January 1, 1990, through June 30, 1994, Respondent owes $12,[441] for the 12,[441] head of cattle for which he failed to remit assessments. The [late payment charge] due, using an average per head of cattle based on the [late payment charge] determined by the auditor, is $11,[553].

The number of cattle for the period October 1, 1986, through December 31, 1989, for which Respondent should have remitted assessments is [8,982] (based on the average number of monthly cattle transactions occurring [from] Janu-

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[2] Paragraph III(L) of the Complaint [alleges that Respondent failed to remit assessments during the period 1986 through the date the Complaint was filed, October 29, 1993.] ... No motion to amend the Complaint [to include allegations that Respondent failed to remit assessments during the period October 30, 1993, through June 30, 1994, was filed]. However, Respondent did not object at the hearing to litigation of transactions occurring after October 1993 and did not raise the issue in [Respondent's] Brief.

ary 1, 1990[, through June 30, 1994]). Respondent thus owes $[8,982] for these transactions. The [late payment charge] due on these cattle is $3[3],6[01].

In summary, the total unremitted assessments for the periods October 1, 1986, through December 31, 1989, and January 1, 1990, through June 30, 1994, is $2[1,423] and the total [late payment charges] is $4[5,15]4. The total amount owed by Respondent [to the Kansas Beef Council] is $6[6,577].

. . . .

Findings of Fact

1. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, [resides in Park, Kansas, and] is engaged in the business of buying and selling cattle in Kansas and other states.

2. Respondent is subject to the Beef Promotion and Research Act [of 1985 (7 U.S.C §§ 2901-2911)] and the [Beef Promotion and Research] Order [(7 C.F.R. §§ 1260.101-.217)] and the [Rules and] Regulations [(7 C.F.R. §§ 1260.301-.316)] promulgated pursuant to the [Beef Promotion and Research] Act [of 1985].

3. For the period from October 1, 1986, through June 30, 1994, Respondent was the collecting person as defined by the [Beef Promotion and Research] Order [(7 C.F.R. §§ 1260.101-.217)] and the [Rules and] Regulations [(7 C.F.R. §§ 1260.301.316)] in transactions involving 2[1,423] bead of cattle.

4. As the collecting person, Respondent was responsible for collecting $1.00 for each head of cattle he purchased in these transactions and responsible for remitting the assessments to a [qualified] State . . beef [council]....

5. Respondent did not remit assessments to a [qualified] State ... beef [council] ... as the collecting person for transactions occurring [from] October 1, 1986[, through] June 30, 1994, involving 2[1,423] head of cattle.

[6. Respondent did not pay any late payment charges for assessments that Respondent failed to remit when due.]

[7. As the person responsible for collection and remittance of assessments, Respondent was responsible for transmitting a report of assessments to the Kansas Beef Council each month during the period October 1, 1986, through June 30, 1994.]

[8. Respondent did not transmit any report of assessments to the Kansas Beef Council during the period October 1, 1986, through June 30, 1994.]

Conclusions of Law

[1.]Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, [willfully] violated section 1260.172 [of the Beef Promotion and Research Order] and [sections] 1260.311 and 1260.312 of the [Rules and] Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to collect and remit assessments to a [qualified] State ... beef [council] ... [for 21,423 head of cattle during] the period ... October 1, 1986, through June 30, 1994.

[2. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, willfully violated section 1260.175 of the Beef Promotion and Research Order (7 C.F.R. § 1260.175) by failing to pay late payment charges for assessments that Respondent failed to remit to a qualified State beef council, when due, during the period October 1, 1986, through June 30, 1994.]

[3. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, willfully violated section 1260.201 of the Beef Promotion and Research Order and section 1260.312 of the Rules and Regulations (7 C.F.R. §§ 1260.201, .312) by failing to transmit monthly reports of assessments to the Kansas Beef Council during the period October 1, 1986, through June 30, 1994.]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises seven issues in Respondent's Petition Appealing Decision and Order of Administrative Law Judge

James W. Hunt Dated February 26, 1997, to the Judicial Officer, Combined With Supporting Brief [hereinafter Respondent's Appeal Petition].

I. Respondent's Constitutional Issues

A. Introduction

First, Respondent requests that I:

> (a) Declare the Act, the Order, and all of the rules and regulations issued or adopted under either of the foregoing, to be unconstitutional and order that these administrative proceedings be dismissed for lack of jurisdiction; or, in the alternative,
>
> (b) Order that the enforceability of any decisions made in these administrative proceedings is made specifically subject to the constitutionality of the Act, the Order, and all of the rules and regulations issued or adopted thereunder, as determined in the pending federal court case filed by the Respondent asserting such constitutional challenge, or any appeal taken therefrom; and,
>
> (c) Reverse all adverse findings, holdings or orders of the ALJ which affect this Appeal Request # 1.

Respondent's Appeal Petition at 5.

Respondent raises four issues regarding the constitutionality of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations in his appellate filings. I disagree with Respondent's contention that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional.

B. First Amendment

First, Respondent argues that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional based on *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995) and *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993) (Respondent's Appeal Petition at 2-5). In *Wileman Bros.* and *Cal-*

Almond, the United States Court of Appeals for the Ninth Circuit held that forced assessments to pay for generic advertising under marketing orders promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 [hereinafter AMAA] violate the First Amendment rights of those who were required to pay assessments. However, the Supreme Court of the United States reversed the Ninth Circuit's *Wileman* decision and held that compelled funding of generic advertising does not implicate the First Amendment. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).[3] Specifically, the Supreme Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders do not compel producers to endorse or finance any political or ideological views.

An examination of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations reveals that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations have the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.* First, Respondent is not prohibited or restrained by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations from promoting or advertising his products or from communicating any other message to

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[3] Further, the Supreme Court of the United States vacated the judgment of the United States Court of Appeals for the Ninth Circuit in *Cal-Almond Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995) and remanded the case for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997).

any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that neither the Beef Promotion Act nor the Beef Promotion Order prohibits or restricts any individual advertising or promotion or replaces the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[4]

Further, Respondent is alleged in this proceeding to have failed to collect assessments from producers and remit those assessments to a qualified State beef council. The requirement that Respondent collect assessments from others and remit those assessments to a qualified State beef council does not reduce resources available to Respondent to conduct his own advertising or communicate other messages. Even if the requirements of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations did reduce resources available to Respondent to engage in his own speech, this incidental effect would not amount to a restriction on speech.[5]

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[4] *See* 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments).

[5] *See generally Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2138-39 (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the

Second, Respondent is not compelled to speak by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations. This fact distinguishes the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[6] While Respondent is compelled under the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations to collect and remit assessments used to fund promotion of beef and beef products, this requirement is not a requirement that Respondent speak. Respondent is not publicly identified or publicly associated with the beef promotion program, and Respondent is not required to respond to the beef promotion program.

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fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. , slip op. at 45 (Aug. 27, 1997), *appeal docketed, No. CIV* F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the Mushroom Promotion, Research, and Consumer Information Act of 1990 and the Mushroom Promotion, Research, and Consumer Information Order does not amount to a restriction on speech).

[6] *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S.* 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard,* 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

Third, the beef promotion program has no political or ideological content, and Respondent is not compelled by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations to endorse or finance any political or ideological views. Respondent, however, contends that the beef promotion program is not ideologically neutral (Respondent's Opposition to Complainant's Appeal Petition at 8) because it expresses a "doctrine, opinion or way of thinking" that the consumption of beef is healthy and "not all agree with that opinion" (Respondent's Brief, Appendix # 2 at 44). However, the United States Court of Appeals for the Third Circuit has directly addressed this issue and characterizes the beef promotion program as ideologically neutral as follows:

> 2. *Ideological Neutrality*
>
> The purpose underlying the Beef Promotion Act is ideologically neutral. The federal government seeks to bolster the image of beef solely to increase its sales; it harbors no intent to "prescribe orthodoxy" or "communicate an official view," *see eg., Wooley v. Maynard*, 430 U.S. at 716-17, 97 S. Ct. at 1436-37 (state required that license plates bear state motto to "promote appreciation of history, individualism, and state pride"); *West Virginia Bd. of Education v. Barnette*, 319 U.S. at 624-25, 63 S. Ct. at 1179 (compulsory flag salute sought to engender "national unity").

United States v. Frame, 885 F.2d 1119, 1135 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

Further, the United States District Court for the District of Kansas, relying on *Frame*, specifically rejected Respondent's characterization of the beef promotion program as ideological and held that the beef promotion program is ideologically neutral. *Goetz v. Glickman, supra*, 920 F. Supp. at 1183.

Moreover, section 501(b)(8) of the Federal Agriculture Improvement and Reform Act specifically provides that the Beef Promotion Act establishes a promotion program to pro-

duce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets" (110 Stat. 1031).

If Respondent's view of ideological expression were to be adopted, almost all speech in which a product or person is characterized would constitute ideological expression. However, I find nothing in the record that remotely indicates that the beef promotion program has any ideological content. The beef promotion program "harbors no intent to prescribe orthodoxy" nor does the program "communicate an official view, and I specifically reject Respondent's contention that the statement that "the consumption of beef is healthy" is ideological expression.[7]

The absence of political or ideological content in the beef promotion program distinguishes the program from cases in which the Supreme Court has found that required financing of political or ideological speech violates the right to freedom of speech.[8]

I find that *Glickman v. Wileman Bros. & Elliott, Inc., supra,* is dispositive of the First Amendment issue raised by Re-

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[7] See generally, *In re Donald B. Mills*, 56 Agric. Dec. _, slip op. at 46 (Aug. 27, 1997), *appeal docketed,* No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (holding that the mushroom promotion program (a promotion program similar in nature, purpose, and content to the beef promotion program) has no political or ideological content).

[8] See *Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd of Educ., 431 U.S.* 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

spondent in Respondent's appellate filings. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this proceeding are not relevant to Respondent's First Amendment challenge to the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations. Moreover, prior to the United States Supreme Court's *Wileman* decision, First Amendment challenges to the beef promotion program have been rejected by United States Court of Appeals for the Third Circuit, *United States v. Frame, supra,* 885 F.2d at 1135, and the United States District Court for the District of Kansas, *Goetz v. Glickman, supra,* 920 F. Supp. at 1183.

Thus, the requirement under the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations that Respondent collect and remit assessments for the promotion of beef and beef products does not violate Respondent's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Respondent's rights under the First Amendment are not even implicated by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations.

C. Taxation

Second, Respondent contends that "[t]he Beef Promotion Act is a direct tax which is unconstitutional because it is not apportioned as required by the United States Constitution" and "it does not have a public purpose." (Respondent's Opposition to Complainant's Appeal Petition at 8.)

Article I, section 8, clause 1, of the Constitution of the United States provides:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States[.]

Congress' power to tax under this provision of the Constitution of the United States is limited, as Respondent contends, in two ways: (1) the revenue must be collected for public purposes; and (2) all duties, imposts, and excises must be uniform throughout the United States.[9] However, the imposition of assessments or fees under a regulatory scheme does not constitute a tax within the meaning of the Constitution of the United States, unless the real purpose and effect of the statute and the regulations is to raise revenues for the general support of the government.[10] The test to be applied to determine whether a regulatory scheme is a tax is to examine the purposes of the statute as a whole and if, based on the examination, the primary purpose of the regulatory scheme is to raise revenue and regulation is merely incidental, then the imposition is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that revenue is incidentally obtained does not make the imposition a tax, but rather an imposition for the purpose of effectuating the congressional statute.[11] Courts have found a wide variety of government imposed fees, as-

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[9] *South Carolina v. United States*, 199 U.S. 437, 450 (1905).

[10] *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 595-96 (1884); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1314 (D.C. Cir. 1988); *Brock v. Washington Metro. Area Transit Auth.*, 796 F.2d 481, 488 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Cities Service Co. v. Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp. Emer. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943); *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

[11] *Cities Service Co. v. Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp. Emer. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976); *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943); *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996); *Mulroy v. Block*, 569 F. Supp. 256, 261 (N.D.N.Y. 1983) (mem. decision), *aff'd per curiam*, 736 F.2d 56 (2d Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

sessments, and charges are not taxes in the constitutional sense, but rather, mere incidents of the regulation of commerce.[12]

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[12] *See, eg., Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 595 (1884) (holding that a $.50 duty imposed on ship owners for each immigrant passenger which is paid to the United States Treasury and deposited into a separate fund used to defray the expense of regulating immigration and for the care and relief of immigrants is not a tax subject to the limitations in article I, section 8, clause 1, of the United States Constitution, but a mere incident of the regulation of commerce); *Brock v. Washington Metro. Area Transit Auth.*, 796 F.2d 481, 488-89 (D.C. Cir. 1986) (holding that the requirement that the Washington Metropolitan Area Transit Authority contribute to a special fund established under the Longshore and Harbor Workers' Compensation Act, which is used for the payment of several kinds of workers' compensation payments, is the imposition of a fee, rather than a tax, because the primary purpose of the statute is regulation, not the raising of revenue for the general support of the government), *cert. denied*, 481 U.S. 1013 (1987); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (holding that a $.50 per hundredweight deduction on the proceeds of milk sold in commerce which is required, in accordance with the Agricultural Act of 1949, as amended, to be remitted to the Commodity Credit Corporation, a federal corporate entity within the United States Department of Agriculture, and which is imposed to decrease the oversupply of milk and offset a portion of the cost of the milk price support program, is not a tax), *cert. denied*, 465 U.S. 1080 (1984); *Moon v. Freeman*, 379 F.2d 382, 391-92 (9th Cir. 1967) (holding that the requirement under the Agricultural Act of 1964 that wheat exporters purchase export certificates, which requirement is designed to raise farmer income, avoid budgetary increases, and meet responsibilities under international wheat agreements, is an exercise of the commerce power and not legislation designed to raise revenue); *Morrison Milling Co. v. Freeman*, 365 F.2d 525, 529 n.3 (D.C. Cir. 1966) (stating that a requirement that wheat processors purchase certificates in order to process wheat is not a tax because the purpose of the statute under which the certificates are required to be purchased is to regulate the price of wheat and the proceeds from the purchases are used to guarantee wheat growers minimum prices for wheat; the federal power relied on is the commerce power and the revenue raised is for a regulatory purpose and not to contribute to the general funds of the United States Treasury), *cert. denied*, 385 U.S. 1024 (1967); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957) (holding that the imposition of penalties under the Agricultural Adjustment Act of 1938 for marketing wheat in excess of farm marketing quotas,

The Beef Promotion Act does not raise revenue for the government. Regulation to strengthen the beef industry's position in the market place and to maintain and expand markets and uses for beef and beef products are the primary purposes of the Beef Promotion Act. The mere fact that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations require Respondent to collect assessments and remit those assessments to a qualified State beef council which is required to use the assessments to carry out the purposes of the Beef Promotion Act does not render the regulatory scheme a tax.[13]

D. Interstate Commerce

Third, Respondent contends that "[t]he Beef Promotion Act is not a valid regulation of interstate commerce under the Commerce Clause because it does not have a public purpose." (Respondent's Opposition to Complainant's Appeal Petition at 8.) The determination of what constitutes a public interest

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designed to avoid problems of deficits and surpluses, is an imposition under the commerce clause and not an exercise of the Congress' taxing power); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir., 1943) (holding that the imposition under the Agricultural Adjustment Act of 1938 of a sanction for cultivation and sale of cotton in excess of marketing quotas is not the levying of a tax under the government's taxing power, but a method adopted by the Congress for the purpose of regulating the production of cotton affecting interstate commerce); *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (1996) (holding that the Beef Promotion Act does not raise revenue for the government and the mere fact that money changes hands in the pursuit of the object of the Beef Promotion Act (promotion of the beef industry) does not render the regulatory scheme under the Beef Promotion Act a tax), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996); *Mandel v. Block*, 573 F. Supp. 1522, 1528-29 (S.D.N.Y. 1983) (same as *South Carolina ex rel.* Tindal v. *Block*, 717 F.2d 874 (4th Cir. 1983)); *Mulroy* v. *Block*, 569 F. Supp. 256, 261 (N.D.N.Y. 1983) (mem. decision) (same as *South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874 (4th Cir. 1983)), *aff'd per curiam*, 736 F.2d 56 (2d Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

[13] *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (1996), appeal docketed, No. 96-3120 (10th Cir. Mar. 27, 1996).

initially belongs to Congress. The Beef Promotion Act contains specific findings and a declaration by Congress that the Beef Promotion Act is in the public interest (7 U.S.C. § 2901(a)(2), (4), (b)). Further, the two courts that have addressed the issue concluded that "Congress had, at the very least, a 'reasonable' basis for concluding that [the Beef Promotion Act] was in the public interest[,]" *United States* v. *Frame*, *supra*, 885 F.2d at 1139, and that "[t]he court will not second-guess the Congress' determination that stimulation of the beef industry is in the public interest." *Goetz* v. *Glickman*, *supra*, 920 F. Supp. at 1182.

Moreover, section 501(b)(1) of the Federal Agriculture Improvement and Reform Act of 1996 describes the Beef Promotion Act as "in the national public interest and vital to the welfare of the agricultural economy of the United States" and section 501(b)(8) of the Federal Agriculture Improvement and Reform Act of 1996 specifically states that the Beef Promotion Act is designed to "further specific national governmental goals, as established by Congress" and "further the governmental policy and objective of maintaining and expanding ... markets" (110 Stat. 1030-31).

I find no basis for Respondent's contention that the Beef Promotion Act does not have a public purpose.

Respondent also contends that "the Beef Promotion Act is not valid regulation of interstate commerce under the Commerce Clause because it is not regulatory" . . . [and] "there is no activity being regulated by the Beef Promotion Act." (Respondent's Opposition to Complainant's Appeal Petition at 8-9.) Again, the issues of whether the Beef Promotion Act is regulatory and whether the Beef Promotion Act regulates an activity were addressed in *Goetz* and *Frame* and both courts held that the Beef Promotion Act is a valid regulation of interstate commerce. The court in *Goetz* states:

> Plaintiff [Respondent in this proceeding] argues that Congress was intending to regulate advertising in the

[Beef Promotion] Act. Plaintiff ignores the language of the statute, which provided that the purpose of the [Beef Promotion] Act was to strengthen the beef industry, not to regulate the advertising industry. The objectives contained in the [Beef Promotion] Act are valid. The stimulation of trade in a particular industry is a proper regulatory activity. It was a legitimate goal for Congress to seek to strengthen the beef industry.

Plaintiff ignores reality by taking the position that the production of beef does not substantially affect interstate commerce. Plaintiff ignores the fact that beef and beef products move in interstate commerce. It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause. Congress had a rational basis for finding that the beef industry substantially affects interstate commerce.

This court rejects the plaintiff' s argument that the commerce power is limited to restricting or prohibiting activity. As the Third Circuit noted in *United States v. Frame*, 885 F.2d at 1126, "it is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." The Beef Promotion Act regulates interstate commerce in beef through the imposition of a monetary assessment. The collected assessments are spent on beef promotion and advertising. Advertising stimulates consumer demand for the product being promoted. *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343, 106 S. Ct. 2968, 2977-78, 92 L.Ed.2d 266 (1986). The promotion of beef represents a valid exercise of Congress' broad power to stimulate commerce. *United States v. Frame*, 885 F.2d at 1125.

The *Frame* decision also rejected the argument that the [Beef Promotion] Act was not a "regulatory" program. The Third Circuit found that Congress established

the Act to "strengthen and expand" the nation's beef markets. *Id.* The court noted Congress has in the past regulated commerce by influencing the supply side of agricultural markets (through quotas, loans and subsidies) as well as the demand side (through direct government purchases). In passing the Beef Promotion Act, Congress chose to promote and stimulate the demand side of the market indirectly, by influencing consumer attitudes towards beef. *Id.* at 1126. As noted in *Frame,* the legal definition of "regulate," rather than a more restrictive definition from a standard dictionary of the English language, should be applied in this context. *Id.* at 1126 n.5.

In *Frame,* the court likewise considered an argument that the [Beef Promotion] Act is unconstitutional because no "activity" is being regulated. In *Frame,* the defendant argued that Congress' failure to specify the particular activity being regulated was fatal. The court stated, "we decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the 'activity' of consumer beef purchases,' 'interstate beef sales,' or 'national beef it markets.' Each activity is regulated, and is validly regulated by Congress." *Id.* at 1127.

Goetz v. Glickman, supra, 920 F.2d at 1179-80.

Respondent further contends that "[t]he Beef Promotion Act is not valid regulation of interstate commerce under the Commerce Clause because there is not a rational connection between the regulatory means selected and the asserted ends of the Beef Promotion Act." (Respondent's Opposition to Complainant's Appeal Petition at 9.)

Congress states that the purposes of the Beef Promotion Act are to strengthen the beef industry and to maintain and expand markets and uses for beef and beef products (7 U.S.C. § 2901(b)). The means chosen by Congress to strengthen the

beef industry and maintain and expand markets and uses for beef and beef products is a regulatory scheme to stimulate demand for beef and beef products through promotion, advertising, research, and consumer and industry information. These endeavors are rationally connected to the purposes of the Beef Promotion Act. *United States v. Frame, supra,* 885 F.2d at 1127; *Goetz v. Glickman, supra,* 920 F. Supp at 1180.

E. Equal Protection

Fourth, Respondent contends that "[t]he Beef Promotion Act is unconstitutional because it violates [Respondent's] [r]ight to [e]qual [p]rotection under the Fifth Amendment of the United States Constitution." (Respondent's Opposition to Complainant's Appeal Petition at 9.) Specifically, Respondent contends that the Beef Promotion Act violates his right to equal protection of the laws "[b]ecause assessments under the Beef Promotion Act are only taken from or collected by producers, importers and collecting persons, and are not taken from or collected by other persons in the industry such as packers, processors, transporters, grocers, truckers, etc." (Respondent's Brief, Appendix # 2 at 40).

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.[14]

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[14] *See Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2108 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal govern-

Equal protection requires that persons similarly situated be treated alike. However, virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications.[15] The general rule is that legislation

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ment and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[15] *See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal

is presumed to be valid and will be sustained if the statute's classification scheme is rationally related to a legitimate governmental interest, unless the statute creates a suspect classification or impinges upon a constitutionally protected right.[16]

Equal protection analysis requires a two-part inquiry: 1) whether the challenged legislation has a legitimate governmental purpose; and 2) whether the challenged classification is rationally related to that legitimate governmental purpose. Rational-basis scrutiny is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dal-*

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protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust &Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope bf the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

[16] *Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997); *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996); *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993); *Nordlinger v. Hahn*, 50.5 U.S. 1, 10 (1992); *Dallas v. Stanglin*, 490 U.S. 19, 23 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81 (1988); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981);. *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam).

las v. Stanglin, 490 U.S. 19, 26 (1989). All that is needed to uphold the classification scheme is to find that there are "plausible,"[17] "arguable,"[18] or "conceivable"[19] reasons which may have been the basis for the distinction.

Congress declared that the purposes of the Beef Promotion Act are to strengthen the beef industry's position in the marketplace and to maintain and expand existing markets and uses for beef and beef products. 7 U.S.C. § 2901(b). The Supreme Court of the United States has recognized the legitimate governmental interest in creating other mandatory mar-

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[17] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (holding that where there is a plausible reason for a legislative classification, the equal protection inquiry is at an end); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (stating that in general, the equal protection clause is satisfied so long as there is a plausible policy reason for the classification); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 116, 179 (1980) (holding that where there is a plausible reason for a legislative classification, the equal protection inquiry is at an end).

[18] *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (holding that the admission that the facts in support of a legislative classification are arguable immunizes the legislative classification from an equal protection attack); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) (stating that a legislative classification is not arbitrary if any state of facts reasonably can be conceived that would sustain the classification and it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength).

[19] *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) (stating that a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (stating that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (holding that those challenging legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker).

keting order programs for "advancing the interests of producers" and to "raise producer prices," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 342 (1984), and has described a statutory scheme providing for generic advertising intended to stimulate consumer demand for an agricultural product as "legitimate." *Glickman v. Wileman Bros. & Elliott, Inc., supra,* 117 S. Ct. at 2141.

Moreover, I have previously held that the government's purposes, as declared in the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112), an Act the purposes of which are similar to the purposes of the Beef Promotion Act,[20] are legitimate. *In re Donald B. Mills, Inc., supra,* slip op. at 52-53.

Therefore, I find that government's purposes, as declared in the Beef Promotion Act (7 U.S.C. § 2901(b)), are legitimate.

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[20] "Section 1 of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, sets forth the purposes of the Act as follows:

§ 6101. Findings and declaration of policy

. . . .

(b) Policy

It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to-

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b).

The second step in equal protection analysis is determining whether the exemptions from the payment and collection of assessments under the Beef Promotion Act are rationally related to the legitimate governmental purposes of strengthening the beef industry's position in the marketplace and maintaining and expanding existing markets and uses for beef and beef products. The courts in *Frame* and *Goetz* each addressed this issue and found that there were several rational bases for Congress' decision: an assessment on the initial sale of cattle is easier to administer; ranchers would be the most benefitted by the Beef Promotion Act; ranchers could pass on the cost to others; and Congress may have wanted to grant cattle producers the maximum influence in shaping the program and imposed on them the corresponding financial burdens. *United States v. Frame, supra,* 885 F.2d at 1137-38; *Goetz v. Glickman, supra,* 920 F. Supp. at *1183.* Accordingly, both the *Frame* court and the *Goetz* court rejected the equal protection challenges to the Beef Promotion Act, and Respondent has not raised any issue with respect to his equal protection challenge to the Beef Promotion Act in this proceeding that would warrant a different result.

II. Statute of Limitations

Second, Respondent requests that I:

(a) Declare that the Compliance Guide in effect establishes a three-year statute of limitations with regard to any claims for assessments and penalties thereon being made in these administrative proceedings by the Complainant against the Respondent; and,

(b) Order that any and all claims for assessments and penalties thereon being made in these administrative proceedings by the Complainant against the Respondent with regard to transactions which occurred prior to October 29, 1990 are barred; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request # 2.

Respondent's Appeal Petition at 10.

I disagree with Respondent's contention that the Collection - Compliance Reference Guide establishes a 3-year statute of limitations. The Collection - Compliance Reference Guide, prepared and distributed by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils to understand the Beef Promotion Order and Beef Promotion Regulations and the collection process (Tr. 240), provides variously that the collecting person must "[m]aintain records and documentation pertaining to the checkoff for at least three years following each transaction[,]" "[c]ollecting persons and producers must maintain records pertinent to the checkoff for at least three years[,]" and "all parties involved in [a] transaction [in which one party has non-producer status] should retain a copy of the [non-producer status form] for three years" (RX 169 at 5, 6, 11). However, none of these provisions in the Collection Compliance Reference Guide establishes a statute of limitations on claims to collect assessments and late payment charges that have not been timely remitted by the collecting person or on proceedings instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Further, neither the Beef Promotion Act, the Beef Promotion Order, nor the Beef Promotion Regulations establishes a statute of limitations with regard to claims for assessments and late payment charges that have not been remitted by a collecting person in accordance with the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations or proceedings for the assessment of a civil penalty instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Moreover, I agree with the ALJ that the Collection - Compliance Reference Guide is not a rule or regulation binding on Complainant's enforcement proceedings (Initial Decision and Order at 11).

III. Clements' Cattle

Third, Respondent requests that I:

(a) Declare that the Respondent is not the collecting person with regard to the Clements' cattle sale; and,

(b) Order that the Respondent is not responsible for the collection or payment of any assessment or penalty with regard to the Clements' cattle sale nor is he responsible for any reporting related thereto under the Act, the Order and any rules and regulations thereunder; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect his Appeal request # 3.

Respondent's Appeal Petition at 14.

I agree with Respondent that he was not the collecting person with respect to 228 head of cattle which he purchased from Mr. Clements in Nebraska on February 22, 1992. The ALJ found that Respondent, through his agent, collected an assessment on 228 head of cattle which Respondent bought from Mr. Clements on February 22, 1992, and failed to remit the assessment collected to a qualified State beef council (Initial Decision and Order at 5-6). The ALJ found Mr. Clements' testimony regarding this sale credible and Respondent's testimony regarding the collection of an assessment from Mr. Clements "too equivocal to be credible" (Initial Decision and Order at 6). While Mr. Clements did not remember certain aspects of the sale, he consistently testified that Respondent deducted $228 from the purchase price of the 228 head of cattle to pay the assessment (Tr. 11-31). Further, while Respondent first denied collecting an assessment for the February 22, 1992, transaction with Mr. Clements (Tr. 271), I agree with the ALJ's assessment that Respondent later equivocated (Tr. 283). While the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witness credibility, normally the Judicial Officer accords great weight to an ad-

ministrative law judge's credibility determinations because of the administrative law judge's ability to see and hear the witnesses.[21] I find nothing on this record that is sufficient to reverse the ALJ's credibility determinations.

Further, Respondent contends that his position that he did not deduct any assessment from the price he paid Mr. Clements is supported by Mrs. Goetz' testimony (Respondent's Appeal Petition at 12). However, I do not find Mrs. Goetz' testimony supportive of Respondent's position. Instead, I find that Mrs. Goetz' testimony indicates that she does not know whether Respondent deducted the assessment from the amount he paid to Mr. Clements for the 228 head of cattle which Respondent purchased on February 22, 1992, as follows:

> BY MR. KLAASSEN:
>
> Q. Okay, Alice, one of the first things I want to ask you just before we get going through those items is just kind of quickly in the blue book would you open it to RX-83? Would you identify what that is for me, please?
>
> [BY MRS. GOETZ:]
>
> A. It is a check, No. 1824 to Scott Clements.
>
> Q. Dated 2/22/92?
>
> A. 2/22/92.
>
> Q. And it's for how much?
>
> A. $121, 923.32.
>
> Q. All right. And how -- And then there's a little memo down there as to what it's for. What is it?

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[21] *In re Fred Hodgins*, 56 Agric. Dec. ____, slip op. at 158 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997).

A. 228 steers.

Q. Is there anything on this check that shows that there was anything like a check off withheld?

A. No, there isn't.

Q. Do you know of any records at all that would say there was a check off withheld?

A. No, I don't.

Q. Are you aware if Jerry withheld any check off at all on this?

A. No, I'm not aware of anything.

Q. Okay. Okay, do you know whether Jerry ever took possession of these cattle and brought them into the feed lot?

A. I don't know.

Tr. 347-48.

Finally, Respondent contends that there was a brand inspector present during the February 22, 1992, transaction and therefore, pursuant to 7 C.F.R. § 1260.311(c), Respondent was not the collecting person. Mr. Clements did testify that a brand inspector was present during the transaction, but that the brand inspector did not collect the assessment as follows:

BY JUDGE HUNT:

Q. Mr. Clements, just for my own information on this -- this Complainant's Exhibit 1 -- the line that Mr. Klaassen referred to, the total number of cattle sold that is on there, the statement says, "Both the seller and the buyer have the responsibility to have the $1.00 per head assessment collected and remitted to the qualified state beef council. This form is designed for the seller to use in private treaty sales."

What is that $1.00 a head assessment that has to be collected and remitted?

[BY MR. CLEMENTS:]

A. What is it?

Q. Yes? Is that the cattle sold?

A. Yes.

Q. All the cattle you sell you have to remit -- the seller has to remit $1.00 a head and --

A. This is issued by -- in Nebraska this is issued by a brand inspector.

Q. Um-hmm.

A. Okay. And at that time -- they have changed things around several different times -- at that time the brands inspector would fill this out -- I mean, he put his little number over here, in this deal --

Q. Um-hmm.

A. -- which is the brand inspection number. He would give that to me and say -- and take his copy off and --

Q. At the time of the sale?

A. Yeah, at the time of the sale and say there, I've seen that you've sent in your dollar or do something with it.

Q. Was a brand inspector present at the time of this transaction?

A. Yes, that is what this brand inspection number is down there.

Q. But was a brand inspector present at the time of the transaction?

A. When we filled out all this?

Q. Yes? The brand inspector filled this out?

A. He put the number down there in the corner -- his writing here.

Q. Oh. But did he fill out the form?

A. No, that is my handwriting for the rest of the form. He gave –he filled–

Q. Does he have any responsibility for collecting and remitting the money?

A. Well, I don't know what their rules are right now. It has bounced back and forth.

Q. Well, at that -- at the time of this, 1992?

A. No.

Q. He didn't?

A. He just had these forms. He had these forms and this is a little duplicated -- if you know what they look like --

Q. I am not familiar with them.

A. It is a little duplicated form. It is about three or four deals.

Q. Um-hmm. And he writes his little brand number here, takes off his copy. He sends that in with his brand ins --

Q. Okay. So it is between you and the seller to see that the $1.00 is sent in -- $1.00 a head is sent in? Now why weren't you responsible for this $1.00 a head assessment?

A. Because it was held from my check. $228 were deducted from the amount of purchase of the cattle.

Q. Okay. Did Mr. Goetz tell you this that $228 was --

A. I am 99 per cent positive that it was on my purchase sheet. We filled out the little purchase sheet --

Q. But you don't have that so what do you remem -- what do you remember, Mr. Clements?

A. I remember that it --

Q. Did he say that he was taking out the $228?

A. Yes.

Q. He told you that?

A. Yeah, and that's how come I put down a feedlot collected because I didn't have any -- any --

Q. Okay. So --

A. -- I mean, I wasn't responsible after that point.

Q. At that -- up to that point, you would have been responsible?

A. Yes, yes. It is up to the producer -- and I was the producer – to send it in.

Q. Okay. Okay. Well, when you -- when -- I guess it is negotiated -- arranged between you and the buyer as to how much you are going to receive for your cattle, is that correct?

A. Yes.

Q. Okay. And then it is so much per head or per pound, is that how --

A. Per pound.

Q. So regardless of the price of the cattle, it is always $1.00 a head --

A. That is correct.

Q. --that is assessed? Okay.

A. That is whatever they have come up with -- whoever -

Q. Right. As far as you know?

A. And every time this critter is sold another $1.00 is taxed on.

Q. And so your understanding is that then either you or the buyer has to pay the $1.00 a head and --

A. Yes.

Q. Yes?

A. Yes.

Q. Okay. And Mr. Goetz -- did Mr. Goetz tell you that this $228 that he was deducting was being -- was going to be remitted to the Beef Council?

A. He didn't say that, no.

Q. Do you remember what he did say?

A. Just that they would pay -- they would take care of the checkoff.

Q. Okay. And that is what you called the --

A. Yes.

Q. -- the collection --

A. These four checkoffs. Yes.

Tr. 25-30.

I find, based on Mr. Clements' testimony, that a brand inspector was present at the sale, and I infer from Mr. Clements' testimony that a physical brand inspection was conducted. In accordance with section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)), the brand inspector was responsible for the collection of the assessment due as a result of the sale in Nebraska. Respondent was not responsible for collecting the assessment for the 228 head of cattle he purchased from Mr. Clements on February 22, 1992. Therefore, even though I find that Respondent's agent collected $228 from Mr. Clements and Respondent failed to remit the $228 to a qualified State beef council, I agree with Respondent that he was not the collecting person with respect to the February 22, 1992, purchase of 228 cattle from Mr. Clements and is not liable to a qualified State beef council or the Board for this assessment because section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R.

§ 1260.311(c)) specifically provides that the brand inspector has the responsibility to collect under these circumstances.

IV. Sales at Sale Barns

Fourth, Respondent requests that I:

(a) Declare that all Certification of Non-Producer Status forms signed by the Respondent which were produced as exhibits by the Complainant in this administrative case and on which the boxes indicating "I collected $1.00 per head" were checked are in error if the person to whom such cattle were sold by the Respondent was a sale barn; and,

(b) Declare that all cattle sales included in CX-18 which were sales of cattle by the Respondent at and through any sale barns were sales which occurred within ten (10) days from the date on which the Respondent acquired ownership of such cattle; and,

(c) Order that the Respondent is not responsible for the collection or payment of any assessments or penalties thereon with regard to any cattle sales covered by CX-18 where such cattle sales by the Respondent were at and through any sale barns; and,

(d) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #4.

Respondent's Appeal Petition at 17-18.

I disagree with Respondent's contention that evidence establishing that Respondent sold cattle to a sale barn also establishes that Certification of Non-Producer Status forms on which Respondent certified that he collected an assessment of $1.00 per head are in error and establishes that Respondent resold the cattle in question not later than 10 days from the date on which Respondent acquired ownership I cannot infer, merely based on a finding that Respondent sold cattle to a sale barn, that the documents completed by Respondent contained erroneous certifications or that the cattle which were

sold to the sale barn were acquired by Respondent not later than 10 days from the date on which Respondent acquired. ownership of the cattle. However, as discussed in this Decision and Order, *supra*, pp. 25-26, I find, based on Respondent's testimony and Mr. Loyd's testimony, that Respondent established that he sold 174 cattle listed on page 29 of the Compliance Report (CX 18 at 29) not later than 10 days from the date on which Respondent acquired ownership of the cattle. Therefore, Respondent is not required under the Beef Order and Beef Regulations to pay assessments for the 174 head of cattle listed on page 29 of the Compliance Report (CX 18 at 29) which Respondent sold to Oakley Livestock Commission Co., Inc.

V. Private Treaty Sales

Fifth, Respondent requests that I:

(a) Declare that as part of the Complainant's case against the Respondent with regard to all private treaty sales covered in CX-18 in which no designated collecting person was involved, the Complainant must prove that the seller has not paid or remitted any assessment which is required under the Act to the appropriate qualified State beef council for the Respondent to be found to be the collecting person in such transactions; and,

(b) Declare that with regard to all of the private treaty sales listed in CX-18 on pages 9 through and including page 15, (excluding the sale evidenced by CX-1 which is dealt with elsewhere in this petition and CX-19), the Complainant has failed to prove that the seller in such transactions has not paid or remitted such assessment to the appropriate qualified State beef council; and,

(c) Order that the Complainant has failed to show that the Respondent is responsible for the collection or payment of any assessments or penalties thereon with regard to any of the private treaty sales listed in

CX-18 on pages 9 through and including page 15, (excluding the sales evidenced by CX-1 which is dealt with elsewhere in this petition and CX-19); and,

(d) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #5.

Respondent's Appeal Petition at 20-21.

I agree with the ALJ that Respondent was the collecting person as defined in section 1260.106 of the Beef Promotion Order (7 C.F.R. § 1260.106) in these private treaty sales since Respondent was the person making payment to a producer in these private treaty sales (Initial Decision and Order at 7). Complainant has therefore established its *prima facie* case that Respondent either collected or should have collected assessments involving transactions in which he was the collecting person and that he did not remit such assessments to a qualified State beef council. Respondent could rebut Complainant's case by showing that Respondent was not responsible for the assessments in these private treaty sales by showing that the assessments had been paid by the producer-sellers. Respondent did not do so, and I agree with the ALJ that Complainant established by a preponderance of the evidence that Respondent was the collecting person with respect to these private treaty sales and failed to remit assessments to the appropriate qualified State beef council, as required by the Beef Promotion Order and Beef Promotion Regulations.

VI. Cattle in Section III of Respondent's Brief

Sixth, Respondent requests that I:

(a) Declare that all cattle sales identified in section III of the *Respondent's Brief* were sales which occurred within ten (10) days from the date on which the Respondent acquired ownership of such cattle; and,

(b) Order that the Respondent is not responsible for the collection or payment of any assessments or penalties thereon with regard to any cattle sales identified in section III of the Respondent's Brief; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #6.

Respondent's Appeal Petition at 22.

Respondent identifies 258 head of cattle in section III of Respondent's Brief which Respondent contends were sold no later than 10 days from the date upon which Respondent acquired ownership of the cattle. I have carefully examined the exhibits referenced in section III of Respondent's Brief which Respondent contends supports his position that he sold these 258 cattle within 10 days from the date that he acquired ownership of the cattle. However, I do not find Respondent's evidence strong enough to reverse the ALJ. As the ALJ stated, the sales invoices prepared by Respondent regarding these 258 cattle clearly establish that Respondent did not sell these cattle within 10 days from the date he acquired them, and Respondent has failed to establish that his own invoices indicate the incorrect dates on which Respondent sold the cattle in question (Initial Decision and Order at 9).

VII. Civil Penalty

Seventh, Respondent requests that I:

(a) Declare that no penalty under 7 U.S.C. § 2908 should be imposed; and,

(b) Order that the Complainant's request that a penalty under 7 U.S.C. § 2908 be imposed against the Respondent is denied; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #7. Respondent's Appeal Petition at 24.

I disagree with Respondent's position that no civil penalty should be imposed in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)).

The ALJ determined that section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) provides "the method

for determining the penalty as a late-payment charge for failure to pay assessments" (Initial Decision and Order at 13). Further, the ALJ states that the Beef Promotion Order contains no other penalty provision than section 1260.175, and Complainant's Compliance Report (CX 18 at 6-8) used section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) to calculate the civil penalty (Initial Decision and Order at 13). The ALJ concluded that, "[t]herefore, no additional penalty will be imposed." (Initial Decision and Order at 13.) Despite this analysis of section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175), the ALJ ordered Respondent to pay the Kansas Beef Council "unremitted assessments" of $22,118 and "penalties" of $46,624 (Initial Decision and Order at 12, 14) and assessed Respondent a civil penalty of $46,624 to be paid to the Treasurer of the United Stares (Initial Decision and Order at 14). Respondent appears to agree with the ALJ's analysis of the import of section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175), but commends that, in order to be consistent with this analysis, the ALJ should not have assessed a civil penalty to be paid to the Treasurer of the United States in addition to the "penalty" to be paid to the Kansas Beef Council (Respondent's Appeal Petition at 22-24).

I disagree with the ALJs determination that section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) is a method for determining a penalty under the Beef Promotion Act. Section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) does not in any way limit or relate to the civil penalty that may be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Instead, section 1260.175 of the Beef Promotion Order (7 C.F.R- § 1260.175) contains provisions for the imposition of late-payment charges for assessments that have not been remitted when due to the Board or a State qualified beef council. Late payment charges imposed in accordance with section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) are not designed

to penalize those who fail to remit assessments when due, but rather, are designed to reimburse the entity to which assessments are not timely remitted for the time value of the assessments.

On the other hand, a civil penalty assessed in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)) is a sanction which is designed to deter those who violate any order issued under the Beef Promotion Act. Civil penalties imposed under section 9(a) of the Beef Promotion Act are not in any way related to assessments and late payment charges a respondent may owe the Board or a qualified State beef council under the Beef Promotion Order.

Further, assessment of a civil penalty under section 9(a) of the Beef Promotion Act is not dependent on the Beef Promotion Order or the Beef Promotion Regulations containing a civil penalty provision, as the ALJ suggests. There is no requirement in the Administrative Procedure Act, or elsewhere, that the regulations advise the public of the fact that a violation of the regulations may subject the violator to a civil penalty. Congress informed the public of that fact when it enacted the Beef Promotion Act which specifically provides for the assessment of a civil penalty of not more than $5,000 for violation of the Beef Promotion Order (7 U.S.C. § 2908(a)). When Congress has provided by statute for a civil penalty for certain conduct (violation of the Beef Promotion Order), there is no duty that the Beef Promotion Order or the Beef Promotion Regulations also inform the public of the consequences of violation of the Beef Promotion Order.[22]

Finally, I disagree with the ALJ's finding that the Compliance Report (CX 18 at 6-8) "used" section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) "to calculate the penalty." (Initial Decision and Order at 13.) Instead, while the Compliance Report unfortunately uses the word "penalty,"

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[22] *See In re David Harris*, 50 Agric. Dec. 683, 688-89 (1991) (Ruling on Certified Question).

the figures that appear on pages 6-8 of the Compliance Report under the column entitled "Penalty" are late payment charges calculated by the auditor in accordance with section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) and not civil penalties Complainant recommends be assessed in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)).

Therefore, I disagree with Respondent's contention that no civil penalty should be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)), and I find the ALJ's determination that section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) provides the method for determining the penalty to be in error.

VIII. Failure to Transmit Reports

Complainant raises two issues in Complainant's Appeal Petition.

First, Complainant contends that the ALJs failure to conclude that Respondent failed to file reports required by the Beef Promotion Order was in error (Complainant's Appeal Petition at 3, 13).

I agree with Complainant. Each person responsible for collection and remittance of assessments is required each month to transmit a report of assessments to the qualified State beef council of the state in which the person resides (7 C.F.R. §§ 1260.201, .312). Respondent resides in Park, Kansas (Answer ¶ 1), and the qualified State beef council to which Respondent is required to transmit reports is the Kansas Beef Council (7 C.F.R. § 1260.315). Mr. Schumann, the coordinator of industry relations for the Kansas Beef Council, testified with respect to Respondent's failure to transmit reports required under the Beef Promotion Order and the Beef Promotion Regulations as follows:

BY MS. DESKINS:

Q. Is it the general practice when someone collects assessment that they are going to submit to the Qualified State Beef Board or the Beef Board itself?

[BY MR. SCHUMANN]

A. It is their responsibility of the collecting person to forward that to the Kansas Beef Council, yes, it is.

Q. Has Mr. Goetz ever submitted any assessments to the Kansas Beef Council?

A. No, he has not.

Q. Has he ever submitted any reports?

A. He has not.

Tr. 138.

Complainant proved by a preponderance of the evidence that Respondent did not transmit reports to the Kansas Beef Council as required by section 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.201, .312). Therefore, I conclude that Respondent willfully violated sections 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations once each month during the period October 1, 1986, through June 30, 1994, or on 93 occasions.

IX. Amount of Civil Penalty

Second, Complainant contends that the ALJ misinterpreted the language of the Beef Promotion Act and the Beef Promotion Order in determining the amount of the civil penalty and that the civil penalty assessed by the ALJ should be increased (Complainant's Appeal Petition at 3).

I agree with Complainant's contention that the ALJ misinterpreted the language of the Beef Promotion Act and the Beef Promotion Order in determining the amount of the civil

penalty, and I have addressed the AIJ's error in this Decision and Order, *supra*, pp. 62-65.

Turning to the amount of the civil penalty, the Beef Promotion Act provides for a maximum of $5,000 for violation of the Beef Promotion Order, but does not provide any criteria for determining the amount of the civil penalty. Complainant recommended a civil penalty of $80,000. Mr. Barry L. Carpenter, Director of the Livestock and Feed Division, Agricultural Marketing Service, United States Department of Agriculture (Tr. 32-33), testified as to the basis for Complainant's sanction recommendation as follows:

BY MS. DESKINS:

Q. Can you tell us what sanctions the Agricultural Marketing Service wants in this case?

[BY MR. CARPENTER:]

A. There's a number of them. First of all, we would like to see an order requiring full, complete compliance with the Act and the order. There needs to be full payment of the liabilities and penalties associated with the audit that was performed. There needs to be payment of all accrued penalties from the date of that audit, payment of the liabilities and penalties associated with any additional check offs due since the date of that audit and a civilian penalty of $80,000.00.

Q. Mr. Carpenter, can you tell us why you want these sanctions? Let me rephrase. Can you tell us why the agency wants these sanctions?

A. These sanctions are essential for several reasons. First of all, this program's been in existence since 1986 and Mr. Goetz has failed to remit any assessments during that period of time. These monies were collected from other producers and never remitted. The program has done a number of things for the meat industry and, as such, Mr. Goetz has benefitted from those -- from those impacts on the marketplace without mak-

ing the proper contribution and -- and remitting the money that he collected or monies that he was responsible for paying himself. The entire beef industry and the whole philosophy behind this legislation is that all producers are obligated to contributed [sic] because it's for the gain and benefit of the entire industry and, if one segment fails to do that, it deteriorates the whole process, it leaves negative feelings in the minds of the producers who are doing their fair share and, when one entity is allowed not to do that, it detracts from the whole program and it causes unrest amongst other producers.

As far as the overall check off program, it is essential to make sure that other contributors do not feel like they can totally disregard a federal law.

Tr. 435-36.

In determining the amount of the civil penalty to be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. §. 2908(a)), it is appropriate to consider the nature of Respondent's violations, the number of Respondent's violations, the damage or potential damage to the regulatory program from Respondent's violations, prior warnings or other instructions given to Respondent, and any other circumstances shedding light on the degree of Respondent's culpability,

Respondent has not inadvertently violated the Beef Promotion Order and the Beef Promotion Regulations. Respondent has been in the cattle buying business since 1949 and buys up to 200 head of cattle every day (Tr. 259, 260-64). Respondent was fully aware of the Beef Promotion Order and the Beef Promotion Regulations. The Beef Promotion Act is published in the statutes at large and the United States Code, and Respondent is presumed to know the law.[23] The Beef Promotion Order and the Beef Promotion Regulations are

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[23] *See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

published in the *Federal Register*, thereby constructively notifying Respondent of the Beef Promotion Order and the Beef Promotion Regulations,[24] and Respondent was warned on three occasions of the requirement that he collect assessments and remit those assessments to a qualified State beef council (CX 12-14). The first of these warnings is dated June 1, 1987. Notwithstanding the repeated warnings, Respondent violated the Beef Promotion Order and the Beef Promotion Regulations 21,516 times and continued to violate the Beef Promotion Order and the Beef Promotion Regulations during the period October 1, 1986, through June 30, 1994. Under these circumstances, I find that Respondent's violations were not inadvertent, but were willful.[25]

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[24] *FCC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 17, 19 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976).

[25] An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Toney v. Glickman*, *101* F.3d 1236, 1241 (8th Cir. 1996); *Cox* v. *USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Fred Hodgins*, 56 Agric. Dec. _, slip op. at 143-144 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56, (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec.

Further, Respondent's violations are extremely serious because they completely undermine the ability to conduct a beef promotion program. If sufficient numbers of collecting persons were to violate the Beef Promotion Order and the Beef Promotion Regulations in the manner in which Respondent has violated the Beef Promotion Order and Beef Promotion Regulations, the assessments remitted to the Board and qualified State beef councils would not be sufficient for the

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30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138-39 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 297-98 (1975). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'").

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

operation of the beef promotion program. Moreover, the evidence establishes that, on a number of occasions, Respondent collected assessments from producers and retained those assessments for his own use rather than remitting the assessments to a qualified State beef council, as required by the Beef Promotion Order and Beef Promotion Regulations.

Complainant could have sought the maximum of $5,000 for each violation.[26] Instead, it appears that Complainant seeks a civil penalty of $3.2182798 for each violation which Complainant alleges Respondent committed.[27] In light of the number of Respondent's violations, the willful nature of Respondent's violations, and the serious nature of Respondent's violations, I am perplexed by the small amount of the civil penalty recommended by Complainant for each alleged violation. However, I infer that Complainant believes that this small civil penalty will deter Respondent from future violations of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations. The Department's sanction policy requires that I give appropriate weight to the sanction recommendations of the administrative officials charged with the responsibility for achieving the congressional pur-

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[26] I found that Complainant proved its case by a preponderance of the evidence with respect to 21,516 violations (21,423 violations of the requirement that Respondent remit assessments to a qualified State beef council and 93 violations of the requirement that Respondent transmit reports of assessments to a qualified State beef council) of the Beef Promotion Order and the Beef Promotion Regulations. Complainant could have sought and had assessed a maximum civil penalty of $5,000 for each of these violations, for a total civil penalty of $107,580,000.

[27] Complainant alleges that Respondent violated the requirement that Respondent remit assessments to a qualified State beef council 24,672 times, violated the requirement that Respondent transmit reports of assessments to a qualified State beef council 93 times, and violated the requirement that Respondent submit necessary information in required reports 93 times, for a total of 24,858 alleged violations.

pose of the statute in question,[28] and despite the facts of this case, which would appear to warrant a significantly higher civil penalty, I am reluctant to assess a civil penalty larger than that recommended by Complainant. Therefore, applying Complainant's recommendation of $3.2182798 per violation to the number of violations which I find that Complainant proved by a preponderance of the evidence, I am assessing a civil penalty of $69,244.51 against Respondent.

For the foregoing reasons, the following order should be issued.

Order

1. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) and, in particular, shall cease and desist from:

(a) failing to remit all assessments when due;

(b) failing to remit late payment charges; and

(c) failing to transmit reports in a timely manner.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, is assessed a civil penalty of $69,244.51 which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

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[28] *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476~ 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2014 - South Building
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1413.

Respondent's payment of the civil penalty shall be forwarded to and received by Ms. Deskins within 70 days after service of this Order on Respondent.

3. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, shall pay past-due assessments and late payment charges of $66,577 which shall be paid by certified check or money order, made payable to the Kansas Beef Council, and forwarded to:

Kansas Beef Council
P.O. Box 4567
Topeka, Kansas 66604-0567.

Respondent's payment of the past-due assessments and late payment charges shall be forwarded to and received by the Kansas Beef Council within 70 days after service of this Order on Respondent.

Done at Washington, D.C.
November 3, 1997

William G. Jenson
Judicial Officer

APPENDIX E

57 Agric. Dec. 426, 1998 WL 174654 (U.S.D.A.)

United States Department of Agriculture (U.S.D.A.)

In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.

BPRA Docket No. 94-0001.

Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in part Complainant's Petition for Reconsideration filed April 3, 1998.

Sharlene A. Deskins, for Complainant.

David R. Klaassen, Marquette, Kansas, for Respondent.

Initial Decision issued by James W. Hunt, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C § § 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. § § 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations (7 C.F.R. § § 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § § 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on October 29, 1993.

The Complaint alleges that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent]: (1) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required reports (Compl. § II(A)); (2) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit necessary information in required reports (Compl. § II(B)); and (3) willfully violated section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. § § 1260.311, .312) by failing to remit the assessments due for the purchase and sale of cattle (Compl. § III(A)-(L)). Complainant requests the issuance of an order or orders as authorized under the Beef Promotion Act, including an order requiring Respondent to cease and desist from violating the Beef Promotion Order and Beef Promotion Regulations and assessing civil penalties against Respondent in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 4-5).

On December 10, 1993, Respondent filed an Answer denying the material allegations of the Complaint and contending that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer § § 2-4). Respondent requests: (1) denial of the relief requested in the Complaint; (2) a determination and declaration that the Beef Promotion Act is unconstitutional, void, and unenforceable; and (3) a determination and declaration that the Beef Promotion Order and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer at 1-2).

On August 2, 1994, Respondent filed an action in the United States District Court for the District of Kansas seeking

a temporary restraining order to prevent a hearing from being held in this proceeding. The court issued an order requiring an audit by the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas, of Respondent's books and records pertaining to his raising, buying, selling, and trading of cattle and Respondent's collection of monies, if any, under the Beef Promotion Act and enjoined the instant proceeding pending the completion of the audit of Respondent's books and records (Complainant's Findings of Fact Conclusions of Law and Brief in Support Thereof [hereinafter Complainant's Findings of Fact], Ex. A). On August 4, 1994, Respondent filed a Complaint in the United States District Court for the District of Kansas challenging the constitutionality of the Beef Promotion Act. The court stayed the instant proceeding pending a decision regarding Respondent's constitutional challenges to the Beef Promotion Act. The audit was completed on November 23, 1994 (CX 18 at 5), and the court issued a decision on February 28, 1996, in which the court rejected each of Respondent's constitutional challenges to the Beef Promotion Act and set aside prior orders which enjoined and stayed this proceeding. Goetz v. Glickman, 920 F. Supp. 1173 (D. Kan. 1996), appeal docketed, No. 96-3120 (10th Cir. Mar. 27, 1996).

On September 25 and 26, 1996, Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing in Wichita, Kansas. Sharlene A. Deskins, Esq., represented Complainant. David R. Klaassen, Esq., of Marquette, Kansas, and Clarence L. King, Jr., Esq., and Brian W. Wood, Esq., of the law firm of Hampton, Royce, Engleman & Nelson, of Salina, Kansas, represented Respondent.

On January 8, 1997, Complainant filed Complainant's Findings of Fact. On January 13 and 16, 1997, Respondent filed Respondent's Brief. On February 26, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent failed to collect assessments and remit assessments to a State Cattle-

men's Beef Promotion and Research Board for 22,118 cattle during the period October 1, 1986, through June 30, 1994, in violation of section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and .312 of the Beef Promotion Regulations (7 C.F.R. § § 1260.311, .312) (Initial Decision and Order at 13- 14); (2) ordered Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Initial Decision and Order at 14); (3) assessed a civil penalty of $46,624 against Respondent (Initial Decision and Order at 14); and (4) ordered Respondent to pay past-due assessments and penalties to the Kansas Beef Council in the amount of $68,742 (Initial Decision and Order at 14).

On April 7, 1997, Respondent filed an appeal to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. § § 556 and 557.[1] On June 6, 1997, Complainant filed Complainant's Opposition to the "Petition Appealing Decision and Order of Administrative Law Judge James W. Hunt Dated February 26, 1997, to the Judicial Officer, Combined With Supporting Brief"; Complainant's Appeal and Brief in Support Thereof. On August 18, 1997, Respondent filed Respondent's Response and Opposition to Complainant's Opposition and Appeal Combined With Supporting Brief, and the hearing clerk transmitted the case to the Judicial Officer for decision.

On November 3, 1997, I issued a Decision and Order: (1) concluding that Respondent willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. § § 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

§ 1260.172, .311, .312) by failing to collect and remit assessments to a qualified State beef council for 21,423 cattle during the period October 1, 1986, through June 30, 1994; (2) concluding that Respondent willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late payment charges for assessments that Respondent failed to remit to a qualified State beef council, when due, during the period October 1, 1986, through June 30, 1994; (3) concluding that Respondent willfully violated section 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § § 1260.201, .312) by failing to transmit monthly reports of assessments to the Kansas Beef Council during the period October 1, 1986, through June 30, 1994; (4) ordering Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations; (5) assessing Respondent a civil penalty of $69,244.51; and (6) ordering Respondent to pay past-due assessments and late payment charges of $66,577 to the Kansas Beef Council. In re Jerry Goetz, 56 Agric. Dec. ___, slip op. at 29-30, 72-73 (Nov. 3, 1997).

On November 12, 1997, Complainant filed Complainant's Motion for Reconsideration; on November 17, 1997, Respondent filed Petition for Reconsideration of the Decision of the Judicial Officer [hereinafter Respondent's Petition for Reconsideration]; on December 3, 1997, Respondent filed Response to Complainant's Motion for Reconsideration; on January 7, 1998, Complainant filed Complainant's Brief in Support of its Motion for Reconsideration [hereinafter Complainant's Petition for Reconsideration]; on February 20, 1998, Respondent filed Respondent's Brief Opposing Complainant's Motion for Reconsideration and Supporting Respondent's Petition for Reconsideration of the Decision of the Judicial Officer; and on February 20, 1998, the hearing clerk transmitted the case to the Judicial Officer for reconsideration.

Respondent's request for oral argument before the Judicial Officer (Respondent's Petition for Reconsideration at 5) is denied because the issues have been fully briefed by Complainant and Respondent and oral argument on reconsideration would appear to serve no useful purpose.

Respondent raises three issues in Respondent's Petition for Reconsideration.

First, Respondent contends that:

> . . . [the three-year recordkeeping provisions in the Collection - Compliance Reference Guide (RX 169)] establish a three-year statute of limitations from and after each transaction for the collection of any assessments related thereto, and any interest and penalties thereon. Therefore, claims for any assessments, or any interest or penalties thereon, being made in these administrative proceedings by the Complainant for any period more than three years prior to October 29, 1993, (the date this administrative case was filed), are barred.

Respondent's Petition for Reconsideration at 2.

I disagree with Respondent's contention that the Collection - Compliance Reference Guide establishes a 3-year statute of limitations. The Collection - Compliance Reference Guide, prepared and distributed by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils to understand the Beef Promotion Order and Beef Promotion Regulations and the collection process (Tr. 240), provides variously that the collecting person must "[m]aintain records and documentation pertaining to the checkoff for at least three years following each transaction[,]" "[c]ollecting persons and producers must maintain records pertinent to the checkoff for at least three years[,]" and "[a]ll parties involved in [a] transaction [in which one party has non-producer status] should retain a copy of the [non-producer status form] for three years" (RX 169 at 5, 6, 11). However, none of these provisions in the Collection -Compliance Reference Guide

establishes a statute of limitations on claims to collect assessments and late payment charges that have not been timely remitted by the collecting person or on proceedings instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Further, neither the Beef Promotion Act, the Beef Promotion Order, nor the Beef Promotion Regulations establishes a statute of limitations with regard to claims for assessments and late payment charges that have not been remitted by a collecting person in accordance with the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations or proceedings for the assessment of a civil penalty instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Moreover, the Collection - Compliance Reference Guide is not a regulation binding on Complainant's enforcement proceedings. Complainant may therefore seek to collect unremitted assessments and late payment charges from the effective date of the Beef Promotion Order and seek a cease and desist order and the assessment of a civil penalty based on violations from the effective date of the Beef Promotion Order.

Second, Respondent contends that:

> . . . [the three-year recordkeeping provisions in the Collection - Compliance Reference Guide (RX 169)] are evidence of what the qualified State beef councils, the Cattlemen's Beef Promotion and Research Board . . . and the United States Secretary of Agriculture . . . consistently require of all other producers and collecting persons. . . . To require that the Respondent must have maintained records for more than three years in order to defend himself in these administrative proceedings would be a violation of the Respondent's [e]qual [p]rotection [r]ights under the United States Constitution. (This constitutional argument does not attack the constitutionality of the Beef Promotion Act, or the Order, or the rules and regulations thereunder. Rather, this argument is an attack upon the administration of the

> Beef Promotion Act, the Order, and the rules and regulations thereunder, and is an argument completely separate and independent of the constitutional challenge which the Judicial Officer attempts to address on pages 30-49 of the Judicial Officer's Decision and Order.)

Respondent's Petition for Reconsideration at 2-3.

I disagree with Respondent's contention that the record-keeping provisions of the Collection -Compliance Reference Guide (RX 169) are evidence of what the qualified State beef councils, the Cattlemen's Beef Promotion and Research Board, and the Secretary of the United States Department of Agriculture require of all other collecting persons and producers. The Collection - Compliance Reference Guide is not a regulation binding on Respondent or any collecting person or producer, and is not evidence of what qualified State beef councils, the Cattlemen's Beef Promotion and Research Board, and the Secretary of the United States Department of Agriculture "consistently require of all other producers and collecting persons." (Respondent's Petition for Reconsideration at 2.) Instead, as Mr. Monte Reese, the Executive Director of the Cattlemen's Beef Promotion and Research Board testified, it is a document provided by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils (Tr. 239-41).

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to

the federal government.[2] Equal protection requires that persons similarly situated be treated alike.[3] However, there is no

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[2] See *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 217 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[3] It should be noted that virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications. See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessarily ap-

evidence on this record that Respondent is required to maintain records for a longer period than other similarly situated persons subject to the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations, or that Respondent's burden with respect to his defense in this proceeding is any greater than it would be for others charged with the same violations of the Beef Promotion Order and the Beef Promotion Regulations.

Third, Respondent contends that his failure to maintain records prior to January 1, 1990, is not a violation of the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations, and without these records, no relevant

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ply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

evidence exists that Respondent violated the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations. (Respondent's Petition for Reconsideration at 3-4.)

I agree with Respondent that there is no evidence on this record that he failed to maintain records in violation of the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations. However, Complainant did not allege, and I did not conclude in the Decision and Order, In re Jerry Goetz, supra, that Respondent failed to maintain records in violation of the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations.

Complainant raises two issues in Complainant's Petition for Reconsideration. First, Complainant contends that:

> The Judicial Officer erred by failing to require the Respondent to remit assessments that the Respondent certified that he collected on 174 head of cattle that were subsequently resold in ten days because the Respondent was required to remit the assessments he collected regardless of whether the cattle were subsequently resold in ten days.
>
> . . . .
>
> The Judicial Officer erred by determining that since the 174 head of cattle were resold in ten days, then the Respondent was not required to remit an assessment on the cattle. This is a misinterpretation of Section 1260.314. See 7 C.F.R. § 1260.314. Section 1260.314 which is sometimes referred to as the "ten day rule" provides for a limited exemption on the collection of assessments. Section 1260.314 provides that an assessment is not mandatory when three conditions are meet [sic]. Those conditions are 1) that the person certifies that he facilitated the transfer of ownership to a third party 2) the person establishes that the cattle were resold within ten days and 3) the person certifies that the assessment has been collected and remitted. 7 C.F.R. §

> 1260.314(a)(2) (emphasis added). Thus, the resale of cattle in ten days is only one of three conditions that must be met in order to be exempt from paying an assessment. In this case the Respondent established that the cattle were resold in ten days. However, the Respondent certified that he collected the assessments on the earlier purchase but would not remit the assessment as required. Thus, the Respondent failed to fulfill all of the conditions under Section 1260.314(a)(2) that would allow him to be exempt from paying an assessment on the 174 cattle when he resold them.

Complainant's Petition for Reconsideration at 1, 3-4 (footnote omitted).

I agree with Complainant that I erroneously determined, in the Decision and Order, In re Jerry Goetz, supra, that Respondent was not required to remit the assessments he collected on 174 cattle, which Respondent resold in 10 days.

Section 1260.106 defines a collecting person, as follows:

> § 1260.106 Collecting person.
>
> "Collecting person" means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

7 C.F.R. § 1260.106.

Section 1260.172(a)(1) of the Beef Promotion Order also provides that each person making payment to a producer for cattle shall be a collecting person and is required to collect an assessment from the producer and remit the assessment, as follows:

> § 1260.172 Assessments.
>
> (a) Domestic assessments. (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from

such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

7 C.F.R. § 1260.172(a)(1).

Moreover, section 1260.311(a) of the Beef Promotion Regulations requires each person making payment to a purchaser for cattle purchased in the United States to collect and remit an assessment, as follows:

§ 1260.311 Collecting persons for purposes of collection of assessments.

Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be:

(a) Except as provided in paragraph (b) and (c) of this section, each person making payment to a producer for cattle purchased in the United States shall collect from the producer an assessment at the rate of $1.00 per head of cattle purchased and shall be responsible for remitting assessments to the qualified State beef council or the Cattlemen's Board as provided in § 1260.312. The collecting person shall collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. The person paying the producer shall give the producer a receipt indicating payment of the assessment.

7 C.F.R. § 1260.311(a).

The record reveals that Respondent purchased the 174 cattle in question from producers and collected an assessment at the rate of $1 per head from the producers, but failed to remit the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council. Neither section 1260.311(b) nor 1260.311(c) exempts Respondent from

the requirement that he collect and remit an assessment for the 174 cattle in question. Therefore, Respondent is required pursuant to section 1260.311(a) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(a)) to collect and remit the assessment for the 174 cattle in question. Further, I do not find that there is any regulation approved by the Secretary that exempts Respondent from the requirement to collect and remit the assessment for the 174 cattle in question in accordance with section 1260.172(a) of the Beef Promotion Order (7 C.F.R. § 1260.172(a)).

I found in the Decision and Order, In re Jerry Goetz, supra, that section 1260.314(a)(2) of the Beef Promotion Regulations exempted Respondent from the requirement to collect and remit the assessment on the 174 cattle that Respondent purchased from producers. However, on reconsideration, I find that section 1260.314(a)(2) of the Beef Promotion Regulations (7 C.F.R. § 1260.314(a)(2)) exempts a collecting person from having to pay an assessment on the sale of cattle if the collecting person sells cattle within 10 days from the date on which the collecting person acquired ownership of the cattle and the collecting person complies with the additional provisions of section 1260.314(a)(2) of the Beef Promotion Regulations (7 C.F.R. § 1260.314(a)(2)). However, compliance with section 1260.314(a)(2) of the Beef Promotion Regulations does not exempt a collecting person from the requirement that he or she collect and remit an assessment based upon the purchase of cattle, even if the cattle are subsequently sold within 10 days from the date on which the collecting person acquired ownership of the cattle.

The October 1, 1986, interim final rulemaking document describes the certification in section 1260.314(a)(2) of the Beef Promotion Regulations as designed to relieve the seller of the responsibility of paying an assessment, as follows:

> The Board also recommended the form of the certification which must be used to claim that a transaction is exempt from an assessment under the order because

ownership of such cattle was acquired merely to facilitate the transfer of such ownership to a third party. This certification will relieve the seller of such cattle of the responsibility for paying an additional $1 per head assessment upon the resale of such cattle and would provide the collecting person with documented evidence that an assessment is not due.

51 Fed. Reg. 35,196, 35,197 (1986) (emphasis added).

On February 26, 1988, the Agricultural Marketing Service published a final rulemaking document adopting, with modifications not relevant to this proceeding, the October 1, 1986, interim final rule. The final rulemaking document describes the purpose of the exemption from assessment, as follows:

The Board also recommended the form of the certification which must be used to claim that a transaction is exempt from an assessment under the order because ownership of such cattle was acquired merely to facilitate the transfer of such ownership to a third party. This certification relieves the person who would otherwise be required to collect an assessment of the responsibility for collecting the assessment and would provide documentary evidence that an assessment is not due for such a transaction.

Comments

The interim final rule provided a period of 30 days for comments. One comment was received from an association representing livestock markets.

The commentor suggested that § 1260.314 "Certification of non-producer status for certain transactions" be modified. This section provides that assessments will not be levied on sales of cattle if the owners certify (1) that their only share in the proceeds of the sale is a sales commission, handling fee or other service fee, or (2) that they acquired ownership to facilitate the transfer of ownership to a third party and that the resale occurred

within 10 days. The commentor suggested that persons who sell cattle on commission should not be required to complete a certificate of exemption.

Auction markets and commission firms which sell cattle on commission without taking ownership of the cattle are not required by § 1260.314 to complete certification of non-producer status forms for such transactions. However, the section does require persons who buy cattle and resell them on a commission basis (for example, order buyers) to make the certification in order to be eligible for exemption from assessment on such transactions. This certification is necessary for the effective enforcement and administration of the Act and order because the documents which are provided to buyers in the general course of business may not always reveal whether the seller is receiving only a sales commission, handling fee, or other service fee. Without the certification, buyers in such transactions could not be certain whether they would be required to collect an assessment. The certification will help the Board to determine whether a buyer should have collected an assessment on a particular transaction. Accordingly the suggested change has not been adopted.

53 Fed. Reg. 5752, 5753-54 (1988) (emphasis added).

Therefore, the Order in the Decision and Order issued November 3, 1997, is not reinstated, and a new Order is issued in this Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration which increases the amount of the civil penalty assessed against Respondent and the past-due assessments and the late payment charges imposed on Respondent to reflect Respondent's failure to remit the assessments for the 174 cattle in question.[4]

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[4] I found in the Decision and Order that Respondent committed 21,516 violations of the Beef Promotion Order and the Beef Promotion Regula-

Second, Complainant contends that with respect to the purchase of 228 cattle which Respondent purchased from Mr. Clements in Nebraska on February 22, 1992, Respondent, and not the brand inspector, was the collecting person and was responsible for collecting an assessment from Mr. Clements and remitting the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council (Complainant's Petition for Reconsideration at 5-8).

I disagree with Complainant's contention that Respondent was the collecting person with respect to 228 cattle which Re-

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tions. Based on Complainant's recommendation, I assessed Respondent a civil penalty of $3.2182798 per violation for a total civil penalty of $69,244.51. In re Jerry Goetz, supra, slip op. at 71-73. For the reasons set forth in this Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration, I now find that Respondent committed 21,690 violations of the Beef Promotion Order and the Beef Promotion Regulations. Based on Complainant's recommendation of $3.2182798 per violation, I am increasing the civil penalty assessed against Respondent from $69,244.51 to $69,804.49.

Moreover, in the Decision and Order, I ordered Respondent to pay past-due assessments and late payment charges of $66,577 to the Kansas Beef Council. *In re Jerry Goetz, supra*, slip op. at 73. The order to pay past-due assessments and late payment charges of $66,577 was based, in part, on a finding that for the period January 1, 1990, through June 30, 1994, Respondent owes $12,441 for 12,441 cattle for which he failed to remit assessments and late payment charges of $11,553, using an average per head of cattle based on the late payment charges determined by the auditor. *In re Jerry Goetz, supra*, slip op. at 27. For the reasons set forth in this Order Denying Respondent's Petition for Reconsideration and Denying in Part and Granting in Part Complainant's Petition for Reconsideration, I now find that for the period January 1, 1990, through June 30, 1994, Respondent owes $12,615 for 12,615 cattle for which he failed to remit assessments and late payment charges of $11,715, using an average per head of cattle based on the late payment charges determined by the auditor. Therefore, I am increasing the amount Respondent must pay in past-due assessments and late payment charges to the Kansas Beef Council from $66,577 to $66,913.

spondent purchased from Mr. Clements on February 22, 1992.

Section 1260.172(a)(1) of the Beef Promotion Order provides that the person making payment to a producer for cattle shall be a collecting person, as follows:

> § 1260.172 Assessments.
>
> (a) Domestic assessments. (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

7 C.F.R. § 1260.172(a)(1).

The final rulemaking document relating to the Beef Promotion Order, which was published on July 18, 1986, states that section 1260.172 of the Beef Promotion Order authorizes the issuance of regulations which would permit collection of assessments by brand inspectors and would release the person making payment to the producer of the responsibility of collecting assessments, as follows:

> It was suggested by one State beef council that the order allow those States which use brand inspectors to collect State assessments to continue to use brand inspectors as collecting persons. The Act contemplates that the collecting person will ordinarily be the person making payment to a cattle producer, but it also contemplates that existing collection mechanisms will be utilized by the Board to the extent possible. This final rule authorizes the issuance of regulations which would permit the collection of assessments by brand inspectors in certain states, and also release the person making pay-

ment to the producer of the responsibility of collecting assessments in those States.

51 Fed. Reg. 26,132, 26,136 (1986).

On October 1, 1986, the Agricultural Marketing Service issued an interim final rule with a request for comments which states that the interim rule identifies those states in which State brand inspectors are to serve as the collecting person, as follows:

> The order defines a collecting person as the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary. There are marketing situations in which the collection and remittance process would be facilitated if a person other than the person making payment to the producer were deemed the collecting person. Therefore, the Board has determined that the use of brand inspectors in those States and parts of States where brand inspectors are authorizes [sic] by State law to collect assessments under existing State beef promotion and research programs would be an appropriate and expeditious means of collecting and remitting assessments. These regulations authorize the brand inspectors in the States listed herein to serve as the collecting person in those transactions where assessments are due under the order.

51 Fed. Reg. 35,196, 35,196 (1986).

On February 26, 1988, the Agricultural Marketing Service published a final rulemaking document adopting, with modifications not relevant to this proceeding, the October 1, 1986, interim final rule. The final rule addresses the brand inspectors as collecting persons, as follows:

> The order provides that the collecting person shall be the person making payment to a producer for cattle, or any other person who is responsible for collecting and

> remitting assessments by regulations prescribed by the Board and approved by the Secretary. There are marketing situations in which the collection and remittance process would be facilitated by using the collection mechanism of existing State programs. Accordingly, it has been determined that the use of brand inspectors in those States and parts of States where brand inspectors are authorized by State law to collect assessments under existing State beef promotion and research programs would be an appropriate and expeditious means of collecting and remitting assessments. These regulations authorize the brand inspectors in the States listed herein to serve as the collecting person for assessments due under the order.

53 Fed. Reg. 5752, 5753 (1988).

Section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) provides that, with respect to Nebraska country sales (country sales include any sale which is not conducted at an auction or livestock market and which is not a sale to a slaughter/packer, feedlot, or an order buyer or dealer), the brand inspector has responsibility to collect; however, when there has not been a physical brand inspection, the person paying the producer shall be the collecting person and has the responsibility to collect and remit assessments due.

The record establishes that Respondent's February 22, 1992, purchase of cattle from Mr. Clements at Imperial, Nebraska, was a Nebraska country sale and that a brand inspector was present at the sale. Section 54-101(6) of the Nebraska Revised Statutes defines a brand inspector as a person employed to, among other things, identify brands, as follows:

> 54-101. Terms, defined. For purposes of sections 54-101 to 54-169, 54-415, and 54-1183 to 54-1186, unless the context otherwise requires:
>
> . . . .

> (6) Brand inspector shall mean a person employed by the brand committee, or some other brand inspection agency, within or without the State of Nebraska, for the purpose of identifying brands, marks, or other identifying characteristics of livestock to determine the existence of such brands, marks, or other identifying characteristics and from such determinations attempt to establish correct and true ownership of such livestock, and generally carry out the provisions and enforcement of all laws pertaining to brands, brand inspection, and associated livestock laws. At any time a brand inspection is required by law, any duly authorized Nebraska brand inspector or brand investigator may transfer evidence of ownership of such cattle from a seller to a buyer by issuing a certificate of inspection[.]

Neb. Rev. Stat. § 54-101(6) (1996).

Imperial is located in Chase County which is part of the area designated as the Nebraska brand inspection area.[5] In accordance with section 54-101(25) of the Nebraska Revised Statutes, cattle sold within the brand inspection area must be brand inspected, as follows:

> 54-101. Terms, defined. For purposes of sections 54-101 to 54-169, 54-415, and 54-1183 to 54-1186, unless the context otherwise requires:
>
> . . . .
>
> (25) Brand inspection area shall mean that portion of the State of Nebraska designated by the Legislature as set forth in section 54-134, where brand inspection shall

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[5] Section 54-134 of the Nebraska Revised Statutes provides, as follows:

> 54-101, Nebraska brand inspection area; territory included. There is hereby created the Nebraska brand inspection area which shall consist of all that part of the State of Nebraska lying within the following counties: . . . Chase. . . .

Neb. Rev. Stat. § 54-134 (1996).

> be mandatory and performed on all cattle sold at auction markets, packing plants, slaughterhouses, or farm or ranch sales within such area and all other cattle prior to leaving such brand inspection area unless destined for an open market[.[6]]

Neb. Rev. Stat. § 54-101(25) (1996).

Further, section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) provides that in Nebraska "there exists a requirement that cattle be brand inspected by State authorized inspectors prior to sale" and sections 54-143 and 54-169 of the Nebraska Revised Statutes appear to require a brand inspection under the circumstances relevant to the February 22, 1992, cattle sale by Mr. Clements to Respondent.

Given the presence of the brand inspector during the February 22, 1992, sale of cattle by Mr. Clements to Respondent, the duties of the brand inspector, the location of the sale in a Nebraska brand inspection area, section 1260.311(c) of the Beef Promotion Regulations which provides that there is a requirement in Nebraska that cattle must be brand inspected by State authorized inspectors prior to sale, and sections 54-143 and 54-169 of the Nebraska Revised Statutes which appear to require a brand inspection of the 228 cattle in question, I infer that a physical brand inspection was made by the brand inspector. Therefore, in accordance with section 1260.311(c) of the Beef Promotion Regulations, the brand inspector, not Respondent, was the collecting person and responsible for collecting the assessment from the producer and

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[6] Section 54-101(12) of the Nebraska Revised Statutes defines an open market as "a sales barn, market agency, stockyard, packing plant, or terminal market located out of the Nebraska brand inspection area created in section 54-134 or out of the confines and boundaries of the State of Nebraska, declared as such by the brand committee under section 54-142, where brand inspection is maintained either by employees of the brand committee or by some other state under a reciprocal agreement as allowed under the Packers and Stockyards Act, 1921, as amended[.]"

remitting the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council.[7]

I agree with Complainant that Respondent has enriched himself by collecting the assessment in the amount of $228 for the 228 cattle he purchased from Mr. Clements on February 22, 1992, and failing to remit the assessment to the Cattlemen's Beef Promotion and Research Board or a qualified State beef council.[8] However, while Mr. Clements may have a cause of action against Respondent, Respondent's enrichment does not make Respondent a collecting person liable to a qualified State beef council or the Cattlemen's Beef Promotion and Research Board for the assessment because section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) specifically provides that the brand inspector has the responsibility to collect under the circumstances that I find existed during the February 22, 1992, Nebraska country sale of 228 cattle by Mr. Clements to Respondent.

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 3, 1997, In re Jerry Goetz, supra, Respondent's Petition for Reconsideration is denied, and Complainant's Petition for Reconsideration is denied in part and granted in part.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[9]

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[7] Should the Agricultural Marketing Service institute an action against the brand inspector for failing to collect and remit the assessment with respect to the February 22, 1992, cattle sale, my inference in this proceeding that the brand inspector was the collecting person is not prejudicial because the brand inspector may show that no physical brand inspection was made and that, therefore, he or she was not the collecting person.

[8] *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 51-58 (Nov. 3, 1997).

[9] *In re Allred's Produce*, 57 Agric. Dec. ___, slip op. at 4-5 (Feb. 2, 1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric.

[FN9] Complainant's Petition for Reconsideration and Respondent's Petition for Reconsideration were timely filed and automatically stayed the Decision and Order filed on November 3, 1997. Since Complainant's Petition for Reconsideration is granted in part, the Order in the Decision and Order filed November 3, 1997, is not reinstated.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C § § 2901-2911), the Beef Promotion and Research Order (7 C.F.R. § § 1260.101-.217), and the Rules and Regulations (7 C.F.R. § § 1260.301-.316) and, in particular, shall cease and desist from:

(a) failing to remit all assessments when due;

(b) failing to remit late payment charges; and

(c) failing to transmit reports in a timely manner.

Dec. ___, slip op. at 10 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 13 (Dec. 22, 1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, is assessed a civil penalty of $69,804.49 which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Sharlene A. Deskins

United States Department of Agriculture

Office of the General Counsel

Marketing Division

Room 2014 - South Building

1400 Independence Avenue, S.W.

Washington, D.C. 20250-1413

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 70 days after service of this Order on Respondent.

3. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, shall pay past-due assessments and late payment charges of $66,913 which shall be paid by certified check or money order, made payable to the Kansas Beef Council, and forwarded to:

Kansas Beef Council

P.O. Box 4567

Topeka, Kansas 66604-0567

Respondent's payment of the past-due assessments and late payment charges shall be forwarded to, and received by, the Kansas Beef Council within 70 days after service of this Order on Respondent.

APPENDIX F

99 F. Supp.2d 1308

United States District Court,

D. Kansas.

Jerry GOETZ, d/b/a Jerry Goetz and Sons, Plaintiff,

v.

UNITED STATES of America; United States Department of Agriculture, Dan Glickman, Individually and as The Secretary of the United States Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture, Defendants.

No. 98-1155-JTM.

May 23, 2000.

Clarence L. King, Jr., Hampton & Royce, L.C., Salina, KS, David Klaassen, Marquette, KS, for plaintiff.

Robin Barkett Moore, Office of United States Attorney, Wichita, KS, Thomas W. Millet, Frank W. Hunger, U.S. Dept. of Justice, Civil Division, Washington, DC, Felicia L. Chambers, U.S. Dept. of Justice, Washington, DC, for defendants.

MEMORANDUM AND ORDER

MARTEN, District Judge.

Plaintiff Jerry Goetz brings this appeal pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq. Under the Beef Promotion and Research Act ("BPA"), the Secretary of Agriculture ("Secretary") has ordered Goetz to pay assessments, late charges and a civil penalty. Goetz filed a separate civil rights action challenging the constitu-

tionality of the Secretary's decision, which has been separately terminated in the Secretary's favor. The present action involves the Secretary's imposition of civil penalties against Goetz.

I. Factual Background

Goetz has been in the cattle buying business in Kansas since 1949. He does some farming and does his cattle buying and selling as the owner and operator of Jerry Goetz and Sons. He visits a different sale barn each day, where he buys and sells cattle. He keeps some cattle at his feedlot, but often promptly resells the cattle he purchases. Goetz buys up to 200 cattle per day.

In the BPA, Congress declared it to be "in the public interest to authorize the establishment ... of an orderly procedure for financing ... and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. § 2901(b). The BPA directs the Secretary to establish, by way of a Beef Promotion and Research Order, such a program and to provide for its financing "through assessments [paid by cattle producers and importers] on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States." *Id.* §§ 2901(b), 2903, 2904(8)(A)-(C). The BPA specifies the required terms and conditions of any such order, *id.* § 2904, and empowers the Secretary to include any terms and conditions necessary to effectuate an order's provisions. *Id.* § 2904(12).

The Beef Research and Promotion Order ("Beef Promotion Order"), 7 C.F.R. Part 1260, Subpart A, promulgated pursuant to notice and comment, establishes the Beef Promotion and Research Board ("Board") and the Beef Promotion Operation Committee ("Committee"), both comprised of private parties, to administer the Beef Promotion Order under

the oversight of the Secretary. *Id.* §§ 2904(1)-(7); 7 C.F.R. §§ 1260.141, 1260.161.

The BPA requires cattle producers in the United States to pay a $1.00 per head assessment on cattle sold in this country.[1] 7 U.S.C. §§ 2904(8)(A), (C); 7 C.F.R. §§ 1260.172(a)(1), 1260.310. Each person making payment to a cattle producer for cattle is designated as a "collecting person" under the BPA and Beef Promotion Order and is required to collect per- head assessments and remit them to a qualified state beef council in the state in which the collecting person resides or, if there is no qualified state beef council within such state, to the Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.311(a), 1260.312(c). The assessment, deducted from the money the purchaser pays to the seller, is commonly referred to as a "checkoff." Each collecting person must report to the Board specified information for each calendar month at the time assessments are remitted, 7 U.S.C. § 2904(11); 7 C.F.R. §§ 1260.201, 1260.312(a)-(c), and must maintain and make available for inspection by the Secretary the records necessary to verify the required reports. 7 U.S.C. § 2904(11); 7 C.F.R. § 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine whether any person subject to the BPA has engaged in or is about to engage in any act that constitutes or will constitute a violation of the BPA, the Beef Promotion Order or implementing rules and regulations. 7 U.S.C. § 2909. The Secretary, after providing an opportunity for an administrative hearing, may issue an order to restrain or prevent a person from violating the Beef Promotion Order and may assess a civil penalty of up to $5,000 for violation of the BPA and Beef Promotion Order. *Id.* § 2908(a). Alternatively, or in addition, the Secretary may request that the Attorney General initiate a civil action to enforce, and to restrain

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[1] The collection of assessment provisions of the Beef Promotion Order became effective October 1, 1986.

a person from violating, any order or regulation promulgated by the Secretary under the BPA. *Id.* §§ 2908(b), (c).

Goetz allegedly failed to remit assessments as the "collecting person" in transactions involving over 24,000 cattle. Goetz's alleged failure to remit assessments was first brought to his attention in a letter dated June 1, 1987 from the Kansas Beef Council. In February and June 1992, the Kansas Beef Council again sent Goetz letters concerning his alleged failure to comply with the Beef Promotion Order.

More facts will be discussed below as they become relevant to the court's analysis.

II. Procedural History

By filing a complaint on October 29, 1993, the Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture ("Administrator"), instituted this proceeding under the BPA (7 U.S.C. §§ 2901-2911); the Beef Promotion Order (7 C.F.R. §§ 1260.101- .217); the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) ("Beef Promotion Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) ("Rules of Practice").

The complaint alleged that Jerry Goetz, d/b/a Jerry Goetz and Sons ("Goetz"): (1) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required reports; (2) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit necessary information in required reports; and (3) willfully violated section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) by failing to remit the assessments due for the purchase and

sale of cattle. The Administrator sought the issuance of an order or orders as authorized under the BPA, including an order requiring Goetz to cease and desist from violating the Beef Promotion Order and Beef Promotion Regulations and assessing civil penalties against Goetz in accordance with section 9 of the BPA (7 U.S.C. § 2908). On December 10, 1993, Goetz filed an answer denying the material allegations of the complaint and contending that the BPA, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void and unenforceable.

On August 2, 1994, Goetz filed an action in the United States District Court for the District of Kansas challenging the constitutionality of the BPA and seeking a temporary restraining order to prevent a hearing from being held in the administrative proceeding. The court issued an order requiring an audit by the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas of Goetz's books and records pertaining to his raising, buying, selling, and trading of cattle and Goetz's collection of monies, if any, under the BPA and enjoined the administrative proceeding pending the completion of the audit. The accounting firm completed the audit on November 23, 1994,[2] and the court issued a decision on Feb-

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[2] Darrell D. Loyd conducted the audit and submitted a report entitled, "Kansas Beef Council Compliance Report for Jerome (Jerry) Goetz October 1, 1986 Through June 30, 1994" ("Compliance Report"). Loyd examined Goetz's purchase invoices, sale invoices, canceled checks, deposit slips, and non-producer status forms to determine the head count for cattle that Goetz purchased and for which he should have collected and remitted assessments. Loyd estimated the number of cattle involved in the transactions for October 1, 1986 to December 31, 1989, a period for which Goetz no longer had records, by using the average sales for the period January 1, 1990 to June 30, 1994, a period for which Goetz had records. Loyd estimated in the Compliance Report that Goetz had failed to remit assessments in transactions involving 24,672 head of cattle between October 1, 1986 through June 30, 1994. He determined that Goetz owed $24,672 in assessments and a late payment charge of $51,847.48.

ruary 28, 1996, rejecting each of Goetz's constitutional challenges to the BPA and set aside prior orders which enjoined and stayed the administrative proceeding.[3] The Tenth Circuit affirmed this decision and the Supreme Court denied Goetz's petition for certiorari. *See Goetz v. Glickman,* 920 F.Supp. 1173 (D.Kan.1996), *aff'd,* 149 F.3d 1131 (10th Cir.1998), *cert. denied,* 525 U.S. 1102, 119 S.Ct. 867, 142 L.Ed.2d 769 (1999).

On September 25 and 26, 1996, Administrative Law Judge James W. Hunt ("ALJ") conducted a hearing in Wichita, Kansas. On February 26, 1997, he filed a decision and order, which: (1) concluded that Goetz failed to collect and remit assessments to a State Cattlemen's Beef Promotion and Research Board for 22,118 cattle during the period October 1, 1986 through June 30, 1994 in violation of section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and .312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312); (2) ordered Goetz to cease and desist from violating the BPA, the Beef Promotion Order, and the Beef Promotion Regulations; (3) assessed a civil penalty of $46,624 against Goetz; and (4) ordered Goetz to pay past-due assessments and penalties to the Kansas Beef Council in the amount of $68,742.

Both Goetz and the Administrator appealed the ALJ's decision and order to the Judicial Officer ("JO") to whom the Secretary has delegated authority to act as the final decision-maker in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557. On November 3, 1997, the JO issued a decision and order, which: (1) concluded that Goetz willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Pro-

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[3] The court followed the Third Circuit's decision in *United States v. Frame,* 885 F.2d 1119 (3d Cir.1989), *cert. denied,* 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990), which rejected a virtually identical challenge to the BPA. *Goetz,* 920 F.Supp. at 1178.

motion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to collect and remit assessments to a qualified state beef council for 21,516 cattle during the period October 1, 1986 through June 30, 1994; (2) concluded that Goetz willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late payment charges for assessments that Goetz failed to remit to a qualified state beef council during the period October 1, 1986 through June 30, 1994; (3) concluded that Goetz willfully violated section 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.201, .312) by failing to transmit monthly reports of assessments to the Kansas Beef Council during the period October 1, 1986 through June 30, 1994; (4) ordered Goetz to cease and desist from violating the BPA, the Beef Promotion Order, and the Beef Promotion Regulations; (5) assessed Goetz a civil penalty of $69,244.51;[4] and (6) ordered Goetz to pay past-due assessments and late payment charges in the amount of $66,577 to the Kansas Beef Council.

Goetz and the Administrator both filed motions for reconsideration of the JO's decision and order. On April 3, 1998, the JO issued a second decision and order which denied Goetz's motion for reconsideration and denied in part and granted in part the Administrator's motion for reconsideration. In his second decision and order, the JO (1) ordered Goetz to cease and desist from violating the BPA, the Beef Promotion Order, and the Beef Promotion Regulations; (2) assessed a civil penalty of $69,804.49;[5] and (3) ordered Goetz

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[4] Based on the Administrator's suggestion, the JO assessed Goetz a civil penalty of $3.2182798 per violation for a total penalty of $69,244.51.

[5] The JO found that Goetz should have collected and remitted assessments on an additional 174 cattle. Therefore, this amount represents the adjustment from his prior order assessing the civil penalty (174 x $3.2182798).

to pay past-due assessments and late payment charges in the amount of $66,913.[6]

Goetz now seeks judicial review of the JO's final decision pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq. The court has been asked to resolve the following six issues on appeal: (1) whether there was sufficient evidence for the JO to find Goetz liable for past-due assessments, late payment charges, and civil penalties in the amount of $71,788.89 for the period of October 1, 1986 through December 31, 1989; (2) whether the Collection-Compliance Reference Guide establishes a three- year limitation after each cattle transaction on the collection of assessments, late payment charges, and civil penalties thereon under the BPA; (3) whether Goetz produced sufficient evidence to show he should not be liable for past-due assessments, late payment charges, or civil penalties on any cattle he sold at sale barns; (4) whether Goetz produced sufficient evidence to show he should not be liable for any past-due assessments, late payment charges, or civil penalties on any cattle purchases listed on page 29 of exhibit CX-18; (5) whether the Administrator produced sufficient evidence to show Goetz liable as a collecting person for the collection of the assessment in private treaty sales; and (6) whether the JO misinterpreted and misapplied 7 U.S.C. § 2908(a)(2) when he assessed civil penalties against Goetz in the amount of $69,804.49.

III. Standard of Review

A person who has suffered a legal wrong because of an agency action, or has been adversely affected or aggrieved by an agency action within the meaning of a relevant statute, is entitled to judicial review thereof under Section 702 of the APA. *Western Shoshone Business Council v. Babbitt,* 1 F.3d 1052, 1055 (10th Cir.1993). This court's review of the Sec-

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[6] This amount reflects the amount of past-due assessments and late charges after the JO made the adjustment for the additional 174 cattle.

retary's decision is governed by Section 706 of the APA. Under the APA, the court must afford considerable deference to the agency's findings and set aside the decision only if it was " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Bryan v. Office of Personnel Management,* 165 F.3d 1315, 1319 (10th Cir.1999) (citing 5 U.S.C. § 706(2)(A)). Furthermore, the court must set aside any of the Secretary's findings that are not supported by substantial evidence. 5 U.S.C. § 706(2)(E); *see also Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1575 n. 25 (10th Cir.1994) (noting scope of review provisions of § 706(2) are cumulative; "The arbitrary or capricious standard of § 706(2)(A) is thus a catch-all, picking up administrative conduct not covered by the more specific paragraphs."). "Review under § 706(2)(A) is narrow, and the agency need only demonstrate that it considered relevant factors and alternatives after a full ventilation of issues and that the choice it made was reasonably based on that consideration." *Mount Evans Co. v. Madigan,* 14 F.3d 1444, 1453 (10th Cir.1994); *see also Mountain Side Mobile Estates Partnership v. Secretary of Hous. and Urban Dev.,* 56 F.3d 1243, 1250 (10th Cir.1995) ("When we review an agency's decision under the arbitrary, capricious or abuse of discretion standard, 'our review is narrow and deferential; we must uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors.' ") (citation omitted). Normally, an agency's action is set aside as arbitrary and capricious only "if the agency has relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Rapp v. United States Dep't of Treasury,* 52 F.3d 1510, 1515 (10th Cir.1995).

An agency's findings of fact are conclusive when they are supported by substantial evidence in the record. *Copsey v. National Transp. Safety Bd.*, 993 F.2d 736, 738 (10th Cir.1993); *see also Rapp*, 52 F.3d at 1515 ("Evidence is substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion."). "Under the substantial evidence test, [the court] consider[s] conflicts in the record and specifically define[s] those facts which support the agency's decision." *Rapp*, 52 F.3d at 1515. An agency's findings are supported by the evidence if they are a logical interpretation of the facts; they need not be the only possible reading of the evidence. *Copsey*, 993 F.2d at 738. "While it is permissible for a court to engage in substantial inquiry into the facts, absent clear error, it must be wary to substitute its judgment for that of an expert agency." *Foust v. Lujan*, 942 F.2d 712, 719-20 (10th Cir.1991). The court's function is not to weigh the evidence or to evaluate witnesses' credibility. *Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1278 (10th Cir.1989). As long as there is substantial evidence to support the Secretary's findings, this court will not reverse, even though it might reach a different result if it were making the initial decision on the matter. *Long v. Board of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1151 (10th Cir.1997).

IV. Analysis

A. Past-Due Assessments, Late Payment Charges and Civil Penalties for October 1, 1986 through December 31, 1989

On advice from his accountant, Goetz claims he never maintained business records for more than three years due to a shortage of space. According to Goetz, he began this practice many years before the Administrator brought proceedings against him. As a result of this business practice, he did not maintain any records relevant to the BPA for any cattle transactions prior to January 1, 1990. Goetz contends that without records pertaining to cattle transactions prior to January 1,

1990, no evidence exists to show whether he is liable for any assessments or penalties under the BPA for any period prior to January 1, 1990.

The Administrator argues that the JO's determinations regarding pre-1990 transactions are supported by substantial evidence. Based on the uncontroverted testimony of Bryce Schumann, Coordinator of Industry Relations for the Kansas Beef Council, Goetz did not transmit reports of assessments to the Kansas Beef Council as required by 7 C.F.R. §§ 1260.201 and .312. The Administrator contends this evidence is relevant to prove Goetz did not comply with the BPA prior to 1990. Because Goetz did not submit reports to the Kansas Beef Council, there are no records showing he paid the assessments. Based on this evidence, the Administrator argues that a reasonable mind could conclude, as did the ALJ and the JO, that Goetz had not paid the assessments during the period for which he had no records and for which he did not submit reports to the Kansas Beef Council.

The Administrator argues that Loyd's (the CPA) estimates are the best evidence of the amount Goetz owes for assessments due for the period October 1, 1986 through December 31, 1989, especially since Goetz has not offered any evidence of his own. To determine the amount Goetz owes for that period, Loyd averaged records by year and month based on the data he did have to determine the range of transactions for years for which Goetz provided no data. Goetz does not argue that the number and types of transactions he made during the period for which he maintained records are completely unrepresentative of the number and types of transactions he made during the period for which he failed to keep records.

Given the applicable standard of review, the court concludes that the JO's decision must be upheld. Schumann testified that Goetz had failed to submit the required reports during this period. Because he did not submit the required reports, a rational fact finder could reasonably conclude Goetz failed to remit the assessments that were due. It is also

reasonable to conclude Goetz failed to pay the assessments for this period, considering he failed to submit the reports and assessments for the period in which he did have records, *i.e.*, after January 1, 1990. Why would he pay the assessments from October 1, 1986 through December 31, 1989 and then stop paying them on January 1, 1990? In addition, the Kansas Beef Council sent him a letter on June 1, 1987, advising him that he needed to collect and remit the assessments. If he was submitting the reports and paying the assessments, there would have been no need for this letter. The court finds that the accountant's method of estimation is a fair way to determine an accurate estimate of the amount due for the period in which Goetz has no records. The court finds that Goetz's arguments are without merit, and are hereby rejected.

B. Collection/Compliance Guide

Goetz next argues that the Collection/Compliance Guide, which was prepared by the compliance manager of the Board and provided by the Board to all qualified state beef councils, establishes a three-year limitation after each cattle transaction on the collection of assessments, late payment charges and civil penalties. The Collection/Compliance Guide states that collecting persons must "[m]aintain records and documentation pertaining to the checkoff for at least three years following each transaction." Record Tab 81, exh. RX-168. Goetz claims that "[o]n their face, the three-year-record-keeping provisions contained in the Collection/Compliance Guide establish a three-year statute of limitations from and after each transaction for the collection of any assessments related thereto, and any late payment charges and civil penalties thereon." Plf.Mem. at 14.

Monte Reese, Executive Director of the Board, testified at the hearing before the ALJ. During his testimony, he stated the purpose of the guide was to insure consistent collection procedures among the state beef councils. According to him, the guide is not part of the order or the rules and regulations. "It is merely a guide to assist in consistency." Record Tab 79,

p. 240; *see also id.* at 255 ("[I]t is a guide. It is not a regulation. It is a collection compliance reference guide and it was intended as nothing more nor less than a guide."). "It is sent to State Beef Councils to assist them in insuring compliance with the collection requirements." *Id.*

The provisions on which Goetz relies to establish a three-year statute of limitations pertain to the maintenance of records only. Neither the BPA, the order, nor the Collection/Compliance Guide provisions set forth a statute of limitations on collecting assessments and late charges that have not been properly submitted.

Goetz further argues that requiring him to maintain records for more than three years violates his equal protection rights. However, as the JO pointed out, there is no evidence that suggests Goetz was required to maintain records for a longer period than other similarly situated persons or that his burden with respect to his defense is any greater than it would have been for others charged with the same violations.

The court must reject Goetz's arguments on this issue. The Collection/Compliance Guide is clearly a document to assist state beef councils in their collection efforts. It is not a rule or regulation that is binding on the Secretary's enforcement proceedings. Further, the Guide merely pertains to how long collecting persons should maintain records ("for at *least* three years"). It says nothing about limiting the time in which the Secretary can collect assessments and late charges.

C. Sale Barn Transactions

Goetz argues he produced sufficient evidence in the administrative proceedings to show he should not be liable for any past-due assessments, late payment charges, or civil penalties on any cattle he sold at any sale barns because with regard to those transactions he was not a producer within the meaning of the regulations. As part of his business, Goetz engages in an operation known as cattle "swapping." His cattle-swapping operation consists of buying cattle at one sale

barn and directly moving them to another sale barn where they are sold. According to Goetz, the cattle involved in his swapping operation are never brought to his feedlot; they are immediately moved to the next sale barn and resold within ten days.

Individuals may obtain non-producer status for certain transactions:

> (a) The assessment levied on each head of cattle sold shall not apply to cattle owned by a person ...
>
> (2) If the person:
>
> (i) Certifies that the person acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party,
>
> (ii) Establishes that such cattle were resold not later than 10 days from the date on which the person acquired ownership; and
>
> (iii) Certifies that the assessment levied upon the person from whom the person purchased the cattle, if an assessment was due, had been collected and has been remitted, or will be remitted in a timely fashion.

7 C.F.R. § 1260.314(a)(2); see also 7 C.F.R. § 1260.116(b) (describing persons who are not considered producers).

The JO found Goetz was liable for past-due assessments, late payment charges, and civil penalties on certain cattle sold at sale barns because he failed to show they were sold within ten days. Goetz claims that the auditor erred in finding he held the "swapping" cattle for more than ten days and that Ms. Goetz's record keeping caused this error. The sale invoices pertaining to the transactions in question indicate the cattle were resold after the ten-day period. Ms. Goetz claims the date on some of the sale invoices was the date she prepared the invoices, not the dates on which the cattle were resold. Although Ms. Goetz claimed she sometimes inadver-

tently used an incorrect sale date, she did not testify that all sale invoices had a wrong sale date.

Goetz claims that the feedlot records indicate the resales occurred earlier than the dates appearing on the invoices. However, Goetz did not offer the testimony of anyone who prepared the feedlot records to explain the information on them or how the actual dates that cattle were bought or sold can be determined from the feedlot records. Furthermore, Goetz testified that he sometimes kept cattle for more than thirty days after buying them. The auditor relied on Goetz's sale invoices rather than the feedlot records to determine resale dates because he found the feedlot records "contained conflicting information and that it is the practice of auditors to rely on sale invoices to determine when title to cattle changes." JO First Dec. and Order at 23.

The JO found that the dates appearing on the sale invoices were the presumptive resale dates in the absence of evidence showing that such dates were incorrect. Therefore, Goetz failed to establish he resold the cattle within ten days. The court finds that the sale invoices would be the best evidence to determine when the sales occurred. Based on those, it appears Goetz held some of the cattle for more than ten days, thus disqualifying him from the exemption found in Section 1260.314(a)(2).

D. Transactions Involving Certification of Non-Producer Status Forms

This argument is an extension of the preceding argument because the transactions for which Goetz complains also occurred at sale barns. However, the transactions he is referring to specifically are those occurring at Record Tab 80, page 29 of exhibit CX-18. For each of the purchases listed, there was a Certification of Non-Producer Status form signed by Goetz on which the box indicating "I collected $1.00 per head" was checked. Goetz claims he did not collect the assessment on the cattle purchases listed, that he signed the Certification of

Non-Producer Status forms before they had been completed, and that someone at the sale barns must have checked the wrong box when they were completing the forms.

Goetz supports his position with four arguments. First, he argues that the Administrator produced several other Certification of Non-Producer Status forms he signed, none of which had the boxes checked. This, according to Goetz, suggests that he was signing the forms while they were blank and "the sale barns were completing them but sometimes failed to complete them." Pl.Mem. at 18. The court concludes, however, that this argument weighs against Goetz, who is effectively saying the sale barns failed to complete the forms when they did not check the boxes. But, on the other hand, he argues it was a mistake when the boxes were checked.

Second, Goetz claims there is a noticeable difference between his signature and the handwriting which completed the remainder of the forms. These forms contain little writing. On several of them, it appears that Goetz may very well have completed them. However, it is difficult to determine because of the lack of writing on the forms.

Third, Goetz claims the purchases listed on page 29 of exhibit CX-18 were part of his cattle "swapping" operations. As such, he was not the collecting person because the purchases were made at sale barns. As discussed above, Goetz was unable to show these cattle were resold within ten days of purchasing them.

Finally, Goetz argues the sales and purchases invoices relating to several transactions (listed on page 29 of exhibit CX-18) indicate that there were no deductions withheld by Goetz for the checkoffs. *See* Pl.Mem. at 19-20.

In his first decision and order, the JO found that since Goetz resold the cattle within ten days, he was not required to remit an assessment on the cattle. On reconsideration, however, the JO reversed his decision, finding that all three provisions of 7 C.F.R. § 1260.314(a)(2) had not been met. Section

1260.314(a)(2) provides that an assessment is not required when three conditions are met: (1) the person certifies that he facilitated the transfer of ownership to a third party; (2) the person establishes that the cattle were resold within ten days; and (3) the person certifies that the assessment has been collected and remitted. 7 C.F.R. § 1260.314(a)(2). The Administrator claims Goetz failed to comply with the third element.

On reconsideration, the JO dedicated about five pages to this issue. *See* JO's Recon. Order at 11-16. He concluded that the Certification of Non- Producer Status forms contained Goetz's signature. They also had the box checked that certified Goetz had collected the $1.00 assessments. Because it appears Goetz collected the assessments, he was required to turn them over to the Kansas Beef Council. The JO rejected Goetz's argument that he signed the forms before the boxes were checked.

The JO was in a superior position to assess Goetz's credibility, and the court will affirm on this issue as well. The forms that contain Goetz's signature with the box checked provide sufficient evidence to establish that Goetz did collect the assessments but failed to remit them to the Kansas Beef Council.

E. Private Treaty Sales[7]

Goetz argues that many of his cattle transactions were "private treaty sales," which are sales between producers. In such transactions, Goetz argues, both the seller and the buyer are liable for the collection and remittance of the assessment.[8]

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[7] The Administrator argues the court should not consider this issue because Goetz failed to raise it in his motion for reconsideration. Goetz did raise this issue in his initial appeal of the ALJ's decision to the JO. The Administrator would have a plausible argument if Goetz had raised this issue for the first time in the motion to reconsider, but since he raised it initially, the court can and will consider it.

[8] Goetz seems to base his argument on 7 C.F.R. § 1260.310(c), which provides: "Failure of the collecting person to collect the assessment on

He claims that the Administrator, by attempting to collect assessments from him, may be trying to collect twice for the same transactions since the Administrator has not proven that the cattle sellers have not paid the assessments. The ALJ found that the Administrator demonstrated that Goetz was the "collecting person" as defined by Section 1260.106 of the Regulations because he was "the person making payment to a producer" in these transactions. ALJ Dec. and Order pp. 6-7. Therefore, the Administrator established a prima facie case that Goetz either collected or should have collected assessments involving transactions in which he was the "collecting person" and that he did not remit such assessments. The JO agreed with the ALJ and found that Goetz was the "collecting person" in the transactions involving the private treaty sales. The JO found that Goetz could have rebutted the Administrator's prima facie case by demonstrating he was not responsible for the assessments in the private treaty sales by showing that the assessments had been paid by the producer/seller.

Once again, the court finds that the JO's decision should be upheld. Section 1260.106 defines a "collecting person" as "the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations

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each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's board as required in § 1260.312." He seems to suggest that because he did not pay the assessment, the producer should have. However, it is very possible Goetz collected the assessment but failed to remit it. If that was the case, the producer would have assumed the assessments had been paid. In addition, even if both seller and purchaser were ultimately liable, it would make more sense to go after the purchaser first if no payment had been made because the purchaser seems to have primary responsibility for remitting the assessment as the "collecting person." It appears there was no evidence submitted to show the seller had in fact paid the assessments. Therefore, the Administrator was not getting a double recovery as Goetz suggests.

prescribed by the Board and approved by the Secretary." 7 C.F.R. § 1260.106. Although Goetz claims he was a producer buying cattle from another producer, the fact remains he was the one making payment to the producer, that is, he was the buyer, not the seller.

F. Assessment of Civil Penalties in Excess of $5,000

Section 2908(a)(2) of the BPA states: "If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may--assess a civil penalty of not more than $5,000 for violation of such order." 7 U.S.C. § 2908(a)(2). Pursuant to this section, the JO ordered Goetz to pay a civil penalty in the amount of $69,804.49, which represents $3.2182798 for each of the 21,690 violations.

Goetz feels the JO misinterpreted and misapplied 7 U.S.C. § 2908(a)(2) when he assessed the civil penalty against him. He claims the Administrator asked for the civil penalty at the end of the administrative hearings--*i.e.*, not during his case in chief but rather during rebuttal. Goetz contends 7 U.S.C. § 2908(a)(2) requires "that in order to assess such a civil penalty, an administrative hearing on the record about that very assessment must be afforded to the person against whom such assessment is intended." Pl.Mem. at 23. Goetz also claims the JO lacked statutory authority to assess a civil penalty of over $5,000 at one time for violation of the Beef Promotion Order. He claims 7 U.S.C. § 2908(a)(2) clearly only allows the imposition of one penalty, not to exceed $5,000, after any administrative hearing. He further argues that the late charge is already a penalty and that making him pay an additional $69,804.49 would break him financially and destroy his business. Finally, he argues that the evidence does not support the imposition of a civil penalty.

The Administrator first argues that the plain language of the statute controls and that the interpretation of a statute by

the agency charged with its administration is entitled to great deference. The Administrator contends that the plain language of the statute permits a civil penalty when the Beef Production Order is violated. According to the Administrator, the Beef Production Order is violated every time a person subject to it fails to comply with its provisions. Therefore, the JO could have assessed a penalty of up to $5,000 for each time Goetz failed to remit assessments (21,690) and for each time he failed to transmit reports of assessments (93), which could have resulted in a penalty of up to $108,915,000. Finally, the Administrator argues that the evidence supported the imposition of the civil penalty.

The court will affirm the imposition of the civil penalty. The Tenth Circuit has stated the following about statutory interpretation:

> In interpreting a statute, the starting point is the statutory language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* "In other words, '[u]nless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control.' " *United States v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir.1992) (quoting *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir.1991)), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1364, 122 L.Ed.2d 742 (1993).
>
> ....
>
> Where the plain language of a statute is ambiguous and Congress has not spoken on the issue, we must give considerable deference to an agency's interpretation of a statute it is charged with administering. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d

694 (1984). We must sustain the agency's construction of the statute as long as its construction is reasonable. *Id.* at 845, 104 S.Ct. at 2783.

Long v. Board of Governors of the Fed. Reserve Sys., 117 F.3d 1145, 1157 (10th Cir.1997); *see also Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965) ("The interpretation of a statute by the agency charged with its administration generally is entitled to great deference.")

The plain language of the statute supports the JO's determination. The statute provides that the Secretary may impose a civil penalty not to exceed $5,000 for "violation of such order." Every time Goetz failed to collect and remit assessments and failed to provide monthly reports, he violated the order. Other courts agree with this interpretation. *See Frame*, 885 F.2d at 1124 ("The Secretary may, after an administrative hearing, issue an order to restrain or prevent a person from violating the Beef Order, and assess a civil penalty of up to $5,000 for *a* violation already committed.") (emphasis added); *Goetz*, 920 F.Supp. at 1177 ("After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for *each* violation of the Act and the Order.") (emphasis added). Even if the court were to find the language of the statute ambiguous, it would conclude that the JO's interpretation is not unreasonable.

Goetz's argument that the late charge is a sufficient penalty is without merit. If that were the case, why does 7 U.S.C. § 2908(a)(2) even exist? As the Administrator points out, the purpose of the late charge is to reimburse the Board for the time value of assessments not timely remitted and the purpose of the civil penalty is to deter those who violate any order issued under the BPA.

In sum, the court cannot find that the JO acted arbitrarily or capriciously in his decisions, and his findings are clearly

supported by substantial evidence. Therefore, there are no grounds for reversal in this case.

The present matter has been extensively briefed. Further, given the careful review given to the extensive arguments and evidence submitted by the parties, the court does not encourage the filing of motions for reconsideration. Accordingly, any such motion and accompanying memoranda may not exceed ten double-spaced pages in length, including supporting arguments and authorities, regardless of the number of points raised. Any response shall also be limited to five pages. No replies may be filed.

IT IS ACCORDINGLY ORDERED this 23d day of May, 2000, that the decision of the Secretary is affirmed in all respects.

APPENDIX G

UNITED STATES CODE
TITLE 7. AGRICULTURE
CHAPTER 62--BEEF RESEARCH AND INFORMATION
(Excerpts)

* * *

§ 2902. Definitions

For purposes of this chapter—

* * *

(12) the term "producer" means any person who owns or acquires ownership of cattle, except that a person shall not be considered to be a producer if the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee;

* * *

§ 2903. Issuance of orders

(a) During the period beginning on January 1, 1986, and ending thirty days after receipt of a proposal for a beef promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment on such proposed order. Such proposal may be submitted by any organization meeting the requirements for certification under section 2905 of this title or any interested person, including the Secretary.

(b) After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a beef promotion and research order. The order shall become effective not later than one hundred and twenty days following publication of the proposed order.

* * *

§ 2904. Required terms in orders

An order issued under section 2903(b) of this title shall contain the following terms and conditions:

(1) The order shall provide for the establishment and selection of a Cattlemen's Beef Promotion and Research Board. Members of the Board shall be cattle producers and importers appointed by the Secretary from (A) nominations submitted by eligible State organizations certified under section 2905 of this title (or, if the Secretary determines that there is no eligible State organization in a State, the Secretary may provide for nominations from such State to be made in a different manner), and (B) nominations submitted by importers under such procedures as the Secretary determines appropriate.

* * *

(2) The order shall define the powers and duties of the Board, which shall be exercised at an annual meeting, and shall include only the following powers:

(A) To administer the order in accordance with its terms and provisions.

(B) To make rules and regulations to effectuate the terms and provisions of the order.

(C) To elect members of the Board to serve on the Committee.

(D) To approve or disapprove budgets submitted by the Committee.

(E) To receive, investigate, and report to the Secretary complaints of violations of the order.

(F) To recommend to the Secretary amendments to the order.

In addition, the order shall determine the circumstances under which special meetings of the Board may be held.

* * *

(4)(A) The order shall provide that the Board shall elect from its membership ten members to serve on the Beef Promotion Operating Committee, which shall be composed of ten members of the Board and ten producers elected by a federation that includes as members the qualified State beef councils. The producers elected by the federation shall be certified by the Secretary as producers that are directors of a qualified State beef council. The Secretary also shall certify that such directors are duly elected by the federation as representatives to the Committee.

(B) The Committee shall develop plans or projects of promotion and advertising, research, consumer information, and industry information, which shall be paid for with assessments collected by the Board.

* * *

(5) The order shall provide that terms of appointment to the Committee shall be one year, and that no person may serve on the Committee for more than six consecutive terms. Committee members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Committee. The Committee may utilize the resources, staffs, and facilities of the Board and industry organizations. An employee of an industry organization may not receive compensation for work performed for the Committee, but shall be reimbursed from

assessments collected by the Board for reasonable expenses incurred in performing such work.

(6) The order shall provide that, to ensure coordination and efficient use of funds, the Committee shall enter into contracts or agreements for implementing and carrying out the activities authorized by this chapter with established national nonprofit industry-governed organizations, including the federation referred to in paragraph (4), to implement programs of promotion, research, consumer information, and industry information.

* * *

(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

(B) If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph (1), such assessment shall be collected by the Board.

(C) The order also shall provide that each importer of cattle, beef, or beef products shall pay an assessment, in the manner prescribed by the order, to the Board. The assessments shall be used for payment of the costs of plans and projects, as provided for in paragraph (4), and expenses in administering the order, including more administrative costs incurred by the Secretary after the order has been promulgated under this chapter, and to establish a reasonable reserve. The rate of assessment prescribed by the order shall be one dollar per head of cattle, or the equivalent thereof in the case of imported beef and beef products. A producer who can establish that the producer is participating in a program of an established qualified State beef council shall receive credit, in determining the assessment due from such producer, for contributions to such program of up to 50 cents per head of cattle

or the equivalent thereof. There shall be only one qualified State beef council in each State. Any person marketing from beef from cattle of the person's own production shall remit the assessment to the Board in the manner prescribed by the order.

* * *

(10) The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order.

* * * *

§ 2906. Requirement of referendum

(a) Continuation or termination of order

For the purpose of determining whether the initial order shall be continued, not later than 22 months after the issuance of the order (or any earlier date recommended by the Board), the Secretary shall conduct a referendum among persons who have been producers or importers during a representative period, as determined by the Secretary. The order shall be continued only if the Secretary determines that it has been approved by not less than a majority of the producers voting in the referendum who, during a representative period as determined by the Secretary, have been engaged in the production of cattle. If continuation of the order is not approved by a majority of those voting in the referendum, the Secretary shall terminate collection of assessments under the order within six months after the Secretary determines that continuation of the order is not favored by a majority voting in the referendum and shall terminate the order in an orderly manner as soon as practicable after such determination.

(b) Additional referendum to determine suspension or termination of order

After the initial referendum, the Secretary may conduct a referendum on the request of a representative group comprising 10 per centum or more of the number of cattle producers to determine whether cattle producers favor the termination or suspension of the order. The Secretary shall suspend or terminate collection of assessments under the order within six months after the Secretary determines that suspension or termination of the order is favored by a majority of the producers voting in the referendum who, during a representative period as determined by the Secretary, have been engaged in the production of cattle and shall terminate or suspend the order in an orderly manner as soon as practicable after such determination.

(c) Reimbursement for cost of referendum; time and place of referendum; certification by producers; absentee mail ballot

The Department shall be reimbursed from assessments collected by the Board for any expenses incurred by the Department in connection with conducting any referendum under this section, except for the salaries of Government employees. Any referendum conducted under this section shall be conducted on a date established by the Secretary, whereby producers shall certify that they were engaged in the production of cattle during the representative period and, on the same day, shall be provided an opportunity to vote in the referendum. Each referendum shall be conducted at county extension offices, and there shall be provision for an absentee mail ballot on request.

* * *

§ 2908. Enforcement

(a) Restraining order; civil penalty

If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may--

(1) issue an order to restrain or prevent a person from violating an order; and

(2) assess a civil penalty of not more than $5,000 for violation of such order.

* * *

§ 2911. Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out this chapter. Sums appropriated to carry out this chapter shall not be available for payment of the expenses or expenditures of the Board or the Committee in administering any provisions of the order issued under section 2903(b) of this title.

APPENDIX H

CODE OF FEDERAL REGULATIONS

TITLE 7--AGRICULTURE

SUBTITLE B--REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER XI--AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MISCELLANEOUS COMMODITIES)

PART 1260--BEEF PROMOTION AND RESEARCH

(Excerpts)

§ 1260.106 Collecting person.

"Collecting person" means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

* * *

§ 1260.116 Producer.

"Producer" means any person who owns or acquires ownership of cattle; provided, however, that a person shall not be considered a producer within the meaning of this subpart if (a) the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee; or (b) the person (1) acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party, (2) resold such cattle no later than ten (10)

days from the date on which the person acquired ownership, and (3) certified, as required by regulations prescribed by the Board and approved by the Secretary, that the requirements of this provision have been satisfied.

* * *

§ 1260.169 Promotion, research, consumer information and industry information.

The Committee shall receive and evaluate, or on its own initiative, develop and submit to the Secretary for approval any plans and projects for promotion, research, consumer information and industry information authorized by this subpart. Such plans and projects shall provide for:

(a) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research, consumer information and industry information, with respect to beef and beef products designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products;

(b) The establishment and conduct of research and studies with respect to the sale, distribution, marketing, and utilization of beef and beef products and the creation of new products thereof, to the end that marketing and utilization of beef and beef products may be encouraged, expanded, improved or made more acceptable in the United States and foreign markets;

(c) Each plan or project authorized under paragraph (a) and (b) of this section shall be periodically reviewed or evaluated by the Committee to ensure that each such plan or project contributes to an effective program of promotion, research, consumer information and industry information. If it is found by the Committee that any such plan or project does not further the purposes of the Act, then the Committee shall terminate such plan or project;

(d) In carrying out any plan or project of promotion or advertising implemented by the Committee, no reference to a brand or trade name of any beef product shall be made without the approval of the Board and the Secretary. No such plans or projects shall make use of any unfair or deceptive acts or practices, including unfair or deceptive acts or practices with respect to the quality, value or use of any competing product; and

(e) No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this Part.

* * *

§ 1260.172 Assessments.

(a) Domestic assessments.--

(1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to §1260.172(a)(5).

(2) Any producer marketing cattle of that producer's own production in the form of beef or beef products to consumers, either directly or through retail or wholesale outlets, or for export purposes, shall remit to a qualified State beef council or to the Board an assessment on such cattle at the rate of one dollar ($1) per head of cattle or the equivalent thereof.

(3) In determining the assessment due from each pro-

ducer pursuant to § 1260.172(a), a producer who is contributing to a qualified State beef council(s) shall receive a credit from the Board for contributions to such Council, but not to exceed 50 cents per head of cattle assessed.

* * *

§ 1260.310 Domestic assessments.

(a) A $1.00 per head assessment on cattle sold shall be paid by the producer of the cattle in the manner designated in § 1260.311.

(b) If more than one producer shares the proceeds received for the cattle sold, each such producer is obligated to pay that portion of the assessments which are equivalent to the producer's proportionate share of the proceeds.

(c) Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.

§ 1260.311 Collecting persons for purposes of collection of assessments.

Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be:

(a) Except as provided in paragraph (b) and (c) of this section, each person making payment to a producer for cattle purchased in the United States shall collect from the producer an assessment at the rate of $1.00 per head of cattle purchased and shall be responsible for remitting assessments to the qualified State beef council or the Cattlemen's Board as pro-

vided in § 1260.312. The collecting person shall collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. The person paying the producer shall give the producer a receipt indicating payment of the assessment.

(b) Any producer marketing cattle of that producer's own production in the form of beef or beef products to consumers, either directly or through retail or wholesale outlets, shall be responsible for remitting to the qualified State beef council or the Cattlemen's Board pursuant to § 1260.312, an assessment on such cattle at the rate of $1.00 per head of cattle or the equivalent thereof. The obligation to remit the assessment shall attach upon slaughter of the cattle, and the producer responsible for remitting the assessment shall remit the assessment in the manner provided in § 1260.312. For the purposes of this subpart, a producer marketing cattle of the producer's own production in the form of beef or beef products shall be considered a collecting person.

(c) In the States listed below there exists a requirement that cattle be brand inspected by State authorized inspectors prior to sale. In addition, when cattle are sold in the sales transactions listed below in those States, these State authorized inspectors are authorized to, and shall, collect assessments due as a result of the sale of cattle. In those transactions in which inspectors are responsible for collecting assessments, the person paying the producer shall not be responsible for the collection and remittance of such assessments.

* * * *

APPENDIX *I*

Appellant's Supplemental Brief, *Goetz* v. *Glickman* (*Goetz I*), Tenth Circuit No. 96-3120, July 22, 1997, p. 6

(Excerpt)

* * *

Neither Frame nor this appeal arose under the [Agricultural Marketing Agreement Act]. [Footnote omitted.] Unlike the fact situations to which the *Wileman* decision has been restricted, the beef industry is not only a highly competitive industry, competition within the beef industry is fully protected by the antitrust laws. *See* Aplt. App. at 422-19. [Footnote omitted.]

* * *

APPENDIX J

First Amended Petition, *Goetz* v. *United States*, District Court for the District of Kansas, No. 98-1155, May 20, 1998, at 10-11, ¶¶ 38-42
(Excerpt)

* * *

38. In addition, the Plaintiff has commenced this case to constitutionally challenge certain aspects of the application of the Beef Promotion Act, and the order, rules and regulations promulgated thereunder, to the Plaintiff under the JO's Decision and Order as modified by the Final Order.

RESERVATION AND NONWAIVER OF CONSTITUTIONAL CLAIMS

39. In BPRA Docket No. 94-0001, Plaintiff raised several constitutional challenges to the Beef Promotion Act itself, and all of the orders, rules, and regulations promulgated thereunder which the JO rejected in the JO's decision and Order as modified by the Final Order.

40. Such constitutional challenges are identical to those brought by the Plaintiff in Civil Action No. 94-1299-FGT which are now pending on appeal in Appeal No. 96-3120.

41. To the extent allowed by law, the Plaintiff hereby requests that this Court judicially review the JO's decision and Order as modified by the Final Order with regard to such constitutional challenges and set aside such findings and conclusions contained therein as being contrary to constitutional right and power and hold that the Beef Promotion Act, and all orders, rules, and regulations promulgated thereunder, are unconstitutional.

42. However, in the event that it is not proper for the Plaintiff to duplicate such constitutional challenges pending in Appeal No. 96-3120 in this case, the Plaintiff reserves his right to continue to pursue such challenges in Appeal No. 96-3120, and any further appeal therefrom, and is not waiving such challenges by failing again to pursue them in this case.

* * *

APPENDIX K

First Amended Petition, *Goetz* v. *United States*, District Court for the District of Kansas, No. 98-1155, July 2, 1998, at 1.

(Excerpt)

* * *

THIRD DEFENSE

Res judicata prohibits plaintiff from litigating the constitutionality of the Beef Promotion and research Act ("the Act"), 7 U.S.C. §§ 2901, et seq., implementing rules and regulations at 7 C.F.R. Part 1260, because those claims have been decided against plaintiff and are pending before the U.S. Court of Appeals for the Tenth Circuit. See Jerry Goetz d/b/a/ Herry Goetz and Sons vs. Dan Glickman, 920 F. Supp. 1173 (D. Kan. 1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

* * *

Supreme Court, U.S.
FILED
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No. 01-252

In the Supreme Court of the United States

JERRY GOETZ, DBA JERRY GOETZ AND SONS,
PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for consideration of the constitutionality of the assessments imposed under the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, in light of *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Discussion	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Agnostini v. *Felton*, 521 U.S. 203 (1997)	11
Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980)	7
Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U.S. 371 (1940)	11
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 (1981)	9
Glickman v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997)	5, 6
Goetz v. *Glickman*, 149 F.3d 1131 (10th Cir. 1998), cert. denied, 525 U.S. 1102 (1999)	7
James B. Beam Distilling v. *Georgia*, 501 U.S. 529 (1991)	11
Miller v. *French*, 530 U.S. 327 (2000)	11
Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206 (1998)	9
United States v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990)	4, 7-8
United States v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001)	6, 7
United States v. *Williams*, 504 U.S. 36 (1992)	9

Constitution, statutes and regulations:

U.S. Const.:	
Amend. I	4, 5, 6, 7, 8, 9, 10
Amend. V	4

Statutes and regulations—Continued: Page

Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, Title XVI, 99 Stat. 1597 (7 U.S.C. 2901 *et seq.*) 1-2
7 U.S.C. 2901(a)(4) 2
7 U.S.C. 2901(b) 2
7 U.S.C. 2902(14) 2
7 U.S.C. 2903(a)-(b) 2
7 U.S.C. 2904(1) 2
7 U.S.C. 2904(4)(A) 2, 3
7 U.S.C. 2904(4)(B) 3
7 U.S.C. 2904(8)(A) 8
7 U.S.C. 2904(8)(A)-(C) 3
7 U.S.C. 2904(8)(C) 8
7 U.S.C. 2904(10) 3
7 U.S.C. 2906(a) 3
7 U.S.C. 2906(b) 3
7 U.S.C. 2908(a) 3, 4
7 U.S.C. 2908(b) 3
7 U.S.C. 2908(c) 3
7 U.S.C. 2909 3
Mushroom Promotion, Research, and Consumer Information Act of 1990, Title XIX, Subtitle B, Pub. L. No. 101-624, §§ 1921-1933, 104 Stat. 3854-3865 (7 U.S.C. 6101 *et seq.*) 6-7
7 C.F.R.:
Section 1260.141 2
Section 1260.161 2
Section 1260.168(d) 3
Section 1260.168(e) 3
Section 1260.169(e) 3
Section 1260.172(a)(1) 3
Section 1260.181(b)(7) 3
Section 1260.310 3
Section 1260.311(a) 3
Section 1260.312(c) 3

In the Supreme Court of the United States

No. 01-252

JERRY GOETZ, DBA JERRY GOETZ AND SONS,
PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is not yet reported. The opinion of the district court (Pet. App. F1-F22) is reported at 99 F. Supp. 2d 1308.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2001. On July 16, 2001, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including August 9, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Beef Promotion and Research Act of 1985 (Beef Act), Pub. L. No. 99-198, Title

XVI, 99 Stat. 1597 (7 U.S.C. 2901 *et seq.*), to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b). The Beef Act is the result of Congress's conclusion that "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation." 7 U.S.C. 2901(a)(4).

As directed by the Beef Act, the Secretary of Agriculture promulgated, after notice and comment, the Beef Promotion and Research Order (Beef Order). The Beef Order establishes two entities to conduct the promotion and research programs contemplated by the Beef Act: the Cattlemen's Beef Promotion and Research Board (Cattlemen's Board), composed of cattle producers and importers appointed by the Secretary, and the Beef Promotion Operating Committee (Operating Committee), composed of ten members of the Cattlemen's Board and ten members elected by a federation that includes qualified state beef councils. 7 U.S.C. 2903(a)-(b), 2904(1) and (4)(A); 7 C.F.R. 1260.141, 1260.161.[1]

The Operating Committee, on behalf of the Cattlemen's Board, develops and implements programs of "promotion and advertising, research, consumer

[1] A "qualified State beef council" is defined in the Beef Act as "a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State." 7 U.S.C. 2902(14).

information, and industry information," subject to the approval of the Secretary. 7 U.S.C. 2904(4)(B); 7 C.F.R. 1260.168(d) and (e). Those programs are funded by a $1 per head assessment on all cattle sold in the United States or imported into the United States. The assessment is imposed on the cattle producer but is collected by the person who purchases the cattle from the producer. The assessment is remitted to the Cattlemen's Board or to a qualified state beef council (which, in turn, remits money to the Cattlemen's Board). 7 U.S.C. 2904(8)(A)-(C); 7 C.F.R. 1260.172(a)(1), 1260.310, 1260.311(a), 1260.312(c). The assessment cannot be used "in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the [Beef Order]." 7 U.S.C. 2904(10); see 7 C.F.R. 1260.169(e) (implementing provision), 1260.181(b)(7) (state beef councils cannot use funds in a manner inconsistent with this provision).

On May 10, 1988, the Secretary, as required by the Beef Act, submitted the Beef Order to a nationwide referendum among cattle producers and importers. See 7 U.S.C. 2906(a). The Beef Order was approved by a majority vote. It remains in force today.[2]

The Secretary is authorized to investigate violations of the Beef Act and Beef Order, 7 U.S.C. 2909; to issue orders restraining or preventing such violations and to assess civil penalties of not more than $5000 per violation, 7 U.S.C. 2908(a); and to request that the Attorney General initiate civil enforcement actions in federal district court, 7 U.S.C. 2908(b) and (c).

2. Petitioner Jerry Goetz is a Kansas cattle producer, buyer, and trader who is subject to the assess-

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[2] The Secretary may conduct additional referenda upon the request of at least ten percent of cattle producers. 7 U.S.C. 2906(b).

ment and collection provisions of the Beef Act. On October 29, 1993, the Secretary initiated administrative proceedings against petitioner under 7 U.S.C. 2908(a) for violating the Beef Act and the Beef Order by failing to collect and remit assessments in connection with his purchases of cattle from producers and to submit reports on those transactions. Pet. App. F4-F5. In response, petitioner argued, among other things, that the Beef Act is unconstitutional. *Id.* at F4-F5.

On August 2, 1994, petitioner brought a separate suit in federal district court, contending that the Beef Act is beyond Congress's power to regulate interstate commerce, imposes an unconstitutional direct tax, impermissibly delegates legislative authority, and violates the First and Fifth Amendments. He sought a ruling that the Beef Act is unconstitutional, an injunction against enforcement of the Beef Act, and a refund of any unspent monies. Pet. App. B5-B6. The district court ordered an audit of petitioner's books and enjoined the administrative proceedings pending completion of the audit. *Id.* at B5.

On February 28, 1996, the district court rejected petitioner's constitutional challenges to the Beef Act, relying largely on *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), which had rejected similar constitutional challenges to the Beef Act. Pet. App. B1-B19. As is relevant here, the district court agreed with *Frame* that the Beef Act does not infringe beef producers' First Amendment rights. The district court reasoned that the governmental interests served by the Beef Act are "compelling" and "ideologically neutral," that those interests "cannot be achieved through means significantly less restrictive of free speech or associational freedoms," and that any infringement of those freedoms is "slight."

Id. at B17-B18. The court therefore set aside its prior orders that had enjoined and stayed the administrative proceedings that were pending against petitioner. *Id.* at B19.

The Tenth Circuit affirmed. Pet. App. C1-C17 (149 F.3d 1131). The court of appeals held that petitioner's First Amendment challenge was foreclosed by this Court's intervening decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). The court of appeals understood *Wileman Brothers* to hold that no First Amendment issue is presented by assessments to support generic advertising programs for agricultural products. Pet. App. C15-C17. This Court denied certiorari. 525 U.S. 1102 (1999).

3. In the meantime, on February 26, 1997, the administrative law judge (ALJ) issued a decision and order in the administrative proceeding, which had resumed after the district court lifted its injunction. The ALJ concluded that petitioner had failed to meet his obligations under the Beef Act to collect and remit assessments from cattle producers, to pay late charges on the unremitted assessments, and to transmit monthly reports. The ALJ ordered petitioner to pay past-due assessments, late fees, and civil penalties. Pet. App. D3-D4, D29.

Petitioner appealed to the Judicial Officer, the final deciding officer in the Department of Agriculture's adjudicatory proceedings. The Judicial Officer, relying on *Wileman Brothers*, rejected petitioner's First Amendment challenge, modified the amounts of the past-due assessments, late fees, and civil penalties, and otherwise affirmed the ALJ's decision and order. Pet. App. D4-D5, D29-D36. On cross-motions for reconsideration, the Judicial Officer further modified the amount of money due in favor of the government, while denying

the relief sought by petitioner. Petitioner was ordered to pay $66,913 in assessments that he had failed to remit and late payment charges on those assessments, as well as $69,804.89 in civil penalties based on those violations of the Beef Act and on his failure to submit reports. *Id.* at E24-E25.

Petitioner sought review in the district court, asserting various challenges to the assessments. On May 23, 2000, the district court upheld the Judicial Officer in all respects. Pet. App. F10-F22.

Petitioner appealed to the Tenth Circuit. On April 20, 2001, the court of appeals affirmed. Pet. App. A1-A14.

DISCUSSION

Petitioner requests (Pet. 15) that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001).[3] That disposition would be inappropriate because the First Amendment question that petitioner now seeks to raise was neither pressed nor passed upon by in the court of appeals in this case, and because petitioner's First Amendment claim is different from the one in *United Foods*, is without merit, and would not warrant review even if it were properly presented.

1. In *United Foods*, the Court declined to extend *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), to the assessments imposed under the Mushroom Promotion, Research, and Consumer Information

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[3] Petitioner does not seek plenary review in this Court of the constitutionality of the assessments imposed under the Beef Act. Nor would such review be appropriate in the circumstances of this case.

Act of 1990 (Mushroom Act), Subtitle B of Title XIX of the Agricultural Promotion Programs Act of 1990, Pub. L. No. 101-624, §§ 1921-1933, 104 Stat. 3854-3865 (7 U.S.C. 6101 *et seq.*). As noted above, in the case brought by petitioner against the Secretary of Agriculture to enjoin the same administrative proceedings that culminated in the final agency order at issue here, the court of appeals relied on *Wileman Brothers* to reject a First Amendment challenge to the assessments imposed under the Beef Act. See *Goetz* v. *Glickman*, 149 F.3d 1131 (10th Cir. 1998), cert. denied, 525 U.S. 1102 (1999). Pet. App. C1-C19.[4]

The Court's decision in *United Foods* does not purport to address the constitutionality of the assessments imposed under other statutes, such as the Beef Act, that are textually similar to the Mushroom Act but that involve commodities that may be regulated differently in other respects. Nor does *United Foods* address other possible grounds for sustaining assessments imposed under the Mushroom Act and similar statutes against a First Amendment challenge. See *United Foods*, 121 S. Ct. at 2337-2338 (declining to address whether the assessments could be sustained under the standard announced in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980)); *id.* at 2341 (declining to address whether the assessments could be sustained as part of a program of government speech); see also *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989) (upholding Beef

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[4] The administrative proceedings concerned purchases of cattle that petitioner made between October 1, 1986, and June 30, 1994, before petitioner filed his action challenging the constitutionality of the Beef Act. Pet. App. F6.

Act assessments under strict scrutiny standard), cert. denied, 493 U.S. 1094 (1990).

2. Petitioner may not properly raise a First Amendment challenge to the Beef Act based on *United Foods* in the context of this case, and there is, in any event, no equitable justification for the Court to exercise its discretionary certiorari jurisdiction to allow petitioner to inject a constitutional issue into the case at this late stage.

First, the incidence of an assessment under the Beef Act is on the cattle producer, not the person who purchases cattle from the producer. See 7 U.S.C. 2904(8)(A) and (C). The purchaser simply collects the assessment from the producer and remits it to the Cattlemen's Board or a qualified state beef council. See p. 3, *supra*. The administrative order that petitioner challenges in this case was based not on his failure to *pay* assessments on cattle that he produced and sold, but on his failure to *collect* and *remit* assessments from producers from whom he purchased cattle and to submit reports of those transactions. See Pet. App. D29, D32. While any of the individual producers from whom petitioner purchased cattle presumably could have raised a First Amendment challenge to paying the assessments if they objected to the use of their funds for an advertising or promotion program, petitioner had no comparable First Amendment right to refuse to comply with his distinct statutory duties to collect and remit assessments from those producers and to submit reports of those transactions. See *id.* at D32 (Judicial Officer observes that "[t]he requirement that [petitioner] collect assessments from others and remit those assessments to a qualified State beef council does not reduce resources available to [petitioner] to conduct his own advertising or communicate other messages.").

Whatever may be the force of petitioner's First Amendment claim as an abstract matter, however, the important point for present purposes is that nothing in *United Foods* suggests that a person who merely serves as an agent or conduit for the collection and remission of assessments paid by others has a valid First Amendment objection to performing that role, even if the payors themselves would have a valid First Amendment objection to certain uses of their funds. For that reason alone, the Court's decision in *United Foods* does not furnish a basis for a remand to the court of appeals. Indeed, petitioner does not point to a conflict with any decision of this Court or another court of appeals with respect to whether a mere collector of payments has a valid First Amendment claim.

Second, although petitioner raised a First Amendment claim in the underlying administrative proceedings, he did not raise such a claim in the district court or the court of appeals on judicial review of the final administrative order. See Pet. App. A3-A4 (identifying issues presented to court of appeals); Pet. C.A. Br. 3-4 (same); Pet. App. F8 (identifying issues presented to district court). Nor did the court of appeals address the First Amendment question *sua sponte*. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (a question that was not raised in the court of appeals, although raised in the petition for certiorari, "is not properly before us"); see generally *United States* v. *Williams*, 504 U.S. 36, 43-45 & n.4 (1992).

Third, as noted above, petitioner previously raised a constitutional challenge to the underlying administra-

tive proceedings, and the Tenth Circuit rejected that challenge, relying on *Wileman Brothers*. See Pet. App. C1, C15-C17. Any challenge to the constitutionality of the Beef Act on judicial review of the final order entered in those same administrative proceedings would have been barred not only by circuit precedent resulting from petitioner's prior appeal, as petitioner concedes (Pet. 10), but also by the res judicata effect of the Tenth Circuit's judgment on that appeal. And as noted above, such a challenge would have been without merit in any event, because the First Amendment afforded petitioner no right to avoid his statutory duties to collect and remit assessments due from others (the producers who sold him cattle) and to file reports on those transactions. Those obstacles may well explain petitioner's failure to renew his constitutional challenge to the Beef Act when he sought judicial review of the final administrative order in this case. Although those obstacles may explain petitioner's procedural default, however, they do not excuse it. Indeed, petitioner's failure to preserve the issue in the Tenth Circuit in this case is especially difficult to excuse in light of the fact that this Court granted certiorari in *United Foods*, on which petitioner now relies, on November 27, 2000 (see 531 U.S. 1009), almost six months before the Tenth Circuit rendered its decision in this case.

Fourth, the court of appeals' decision in this case simply sustains an administrative order requiring petitioner to remit assessments, make late payments, and pay civil penalties based on *past* transactions. Those transactions occurred before the Tenth Circuit rendered its prior decision on the constitutionality of the Beef Act—a decision that would properly have been given res judicata effect in this case if petitioner had

raised his constitutional claim in a timely manner. Petitioner has not sought to vacate the final judgment in his earlier case. Nor would *United Foods* provide a basis for doing so. A change in decisional law ordinarily is not regarded as a sufficient circumstance to warrant relief from a final judgment, especially one that requires the payment of money based on past conduct. See *Miller* v. *French*, 530 U.S. 327, 344 (2000); *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997); see also *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) ("[O]nce suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed."). For similar reasons, there is no justification at this late date for relieving petitioner of the res judicata effect of the Tenth Circuit's prior judgment on his obligation in this case to make monetary payments based on past transactions. See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JERRY GOETZ,
d/b/a Jerry Goetz and Sons

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; Anne Veneman, Secretary of the U.S. Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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14 pp

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REASONS FOR GRANTING THE WRIT 1
I. PETITIONER'S CLAIMS WERE PROPERLY PRESERVED IN THE COURTS BELOW. 1
II. THIS CASE SHOULD BE REEVALUATED BY THE TENTH CIRCUIT IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED FOODS* 4
III. THE BEEF ACT IS MATERIALLY INDISTINGUISHABLE FROM THE MUSHROOM ACT AND CANNOT SURVIVE A FIRST AMENDMENT CHALLENGE UNDER THE STANDARDS ARTICULATED IN *UNITED FOODS* 8
IV. VACATUR AND REMAND SERVE THE EQUITIES OF THE CASE AND FURTHER THE ORDERLY AND EFFICIENT ADMINISTRATION OF JUSTICE. 10
CONCLUSION 11

TABLE OF AUTHORITIES

Pages

Cases

Barrows v. *Jackson*, 346 U.S. 249 (1953) 6

Commissioner v. *Sunnen*, 333 U.S. 591 (1948) 1

Connor v. *Finch*, 431 U.S. 407 (1977) 4

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 6

Franklin County Convention Facilities Auth. v. *American Premier Underwriters, Inc.*, 240 F.3d 534 (CA6 2001) 2

Gant v. *Oklahoma City*, 289 U.S. 98 (1933) 3

Glickman v. *Wileman Brothers & Elliot, Inc.*, 521 U.S. 457 (1997) 9

Henry v. *City of Rock Hill*, 376 U.S. 776 (1964) 8

Miller v. *French*, 530 U.S. 327 (2000) 2

Spradling v. *City of Tulsa*, 198 F.3d 1219 (CA10 2000) 2

Standard Industries, Inc. v. *Tigrett Industries, Inc.*, 397 U.S. 586 (1970) 2

Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 3

United States v. *Frame*, 885 F.2d 1119 (CA3 1989), *cert. denied*, 493 U.S. 1094 (1990) 9

United States v. *United Foods, Inc.*, -- U.S. --, 121 S. Ct. 2334 (2001) 9

Wood v. *Georgia*, 450 U.S. 261 (1981) 4

Wooley v. *Maynard*, 430 U.S. 705 (1977) 7

Other Authorities

Brief for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Jan. 24, 2001) 9

Reply Br. for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Apr. 9, 2001) 9

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CLAIMS WERE PROPERLY PRESERVED IN THE COURTS BELOW.

The government's only relevant argument opposing a GVR is the pretense that petitioner "did not raise such a [First Amendment] claim in the district court or the court of appeals" and thus the issue is not properly before this Court. BIO 9. Unfortunately, that argument is based on a falsehood and on a misconception of the nature of a request for a GVR.

Starting with the falsehood, petitioner most certainly *did* raise his First Amendment challenge in the district court. As noted in the petition and confirmed in the appendix, petitioner expressly reiterated in the district court the same constitutional claims that were being reviewed in *Goetz I*. *See* Pet. 6, 10; App. J1-J2. The government below acknowledged those claims and raised the affirmative defense of *res judicata*. App. K1. By the time the district court issued its decision in *Goetz II*, review had been completed in *Goetz I* and certiorari had been denied, which the district court recognized. App. F5-F6. The claim that petitioner failed to raise his arguments in the district court, therefore, is simply a fabrication.

Turning to the government's legal misconceptions, while it is true that petitioner did not continue to press his claims in the Tenth Circuit in this action, that does not undermine his request for a GVR. During the period between the denial of certiorari in *Goetz I* and this Court's decision in *United Foods*, petitioner's claims were indeed *res judicata* and it would have been frivolous – and likely sanctionable – for petitioner to continue to raise them. But after this Court's decision in *United Foods*, *Goetz I* ceased to be good law, and petitioner is no longer bound by either the *res judicata* or precedential effect of that earlier decision. *See, e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948) ("a change or development in the controlling legal principles may make that [prior] determination obsolete or erroneous"); *Spradling* v. *City of*

Tulsa, 198 F.3d 1219, 1223 (CA10 2000) ("[An intervening Supreme Court decision] constitutes an intervening change in the law sufficient to render collateral estoppel and *res judicata* inapplicable.").[1]

Petitioner's failure to reiterate his constitutional arguments in the Tenth Circuit in *Goetz II*, and his renewal of those arguments after *United Foods*, was precisely the correct course for a responsible party to take. Indeed, this Court has expressly held that a change in law between the proceedings below and the petition entitles a petitioner to raise an issue for the first time even on plenary review. *Standard Industries, Inc.* v. *Tigrett Industries, Inc.*, 397 U.S. 586, 587 (1970) (where party did not raise an issue below because it was precluded by controlling law that was subsequently changed, there is no waiver and "we have frequently allowed parties to

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[1] The government's claim, BIO 10-11, that petitioner would continue to be barred by *res judicata* simply ignores the case law from both the Tenth Circuit and this Court. *See also, e.g., Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 550 (CA6 2001) (no preclusion from predecessor litigation where there has been "a substantial change in the legal climate") (citation and quotation marks omitted). The cases the government cites are inapposite because they deal with attempts to re-open matters that were completely final, unlike here where the enforcement action against petitioner is here on direct review and hence still *non*-final and subject to reconsideration, as the government's own case recognizes. *Miller* v. *French*, 530 U.S. 327, 344 (2000) ("The decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired), and 'it is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws."'") (citation omitted). Finally, the notion that because this case relates to *past* transactions petitioner somehow may not take advantage of current law, BIO 11, is simply absurd. While the cattle transactions are in the past, the assessments, fines, and penalties in this case are still executory. The law to be applied to his defense is the law as it stands now, not the law as of the time of the transactions. The government's attempt to imply otherwise is inexplicable.

raise issues for the first time on appeal when there has been a significant change in the law since the trial"); *see also Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n. 7 (1984) ("We may consider petitioners' First Amendment argument, although not raised before the Board, because the intervening, substantial change in controlling law occasioned by *Bill Johnson's Restaurants* qualifies as an 'extraordinary circumstanc[e].'").

In this case, petitioner merely seeks the opportunity to pursue his previously barred, but now revived, arguments before the Tenth Circuit. He is not seeking plenary review, only a GVR. Petitioner raised his constitutional claims at every opportunity reasonably available to him – including before the ALJ, the Judicial Officer, and the District Court in this case – and it is simply unreasonable to say that he is not entitled to review under newly available law simply because he failed to reiterate the then-barred argument before the Tenth Circuit. Having litigated the constitutional issues when seeking to enjoin these very proceedings in *Goetz I*, petitioner is allowed to raise the same issues on petition from the ensuing proceedings regardless of whether he re-litigates those issues before the same court that rejected his arguments in the first place. *Cf. Gant* v. *Oklahoma City*, 289 U.S. 98, 100 (1933) (finding jurisdiction for appeal from state-court decision that did not itself address federal question where federal question was fully litigated, appealed, and rejected on initial injunction motion and case was remanded thereafter for consideration of state questions).

The cases on waiver cited by the government, BIO 9, simply do not apply to the situation in this case. While it is correct that this Court will not ordinarily reach the *merits* of an issue not raised below, this Court is not being asked to reach the merits. The general rule – designed to preserve this Court's resources and to ensure that issues receive adequate consideration before this Court addresses them – simply makes no sense in the context of a GVR. The Court's resources are not at stake here given that it will only be

remanding the case to the Tenth Circuit. And the interest in having issues receive proper consideration is actually furthered by a GVR, which would give the Tenth Circuit the opportunity to correct its own errors in light of precedent not available to it before. Furthermore, in the particulars of this case, the constitutional issues *did* receive full and thorough consideration by multiple courts: The district court and the Tenth Circuit in *Goetz I*, which addressed the very proceeding under review here; the Judicial Officer in this case, which gave lengthy consideration to the constitutional issues; and the district court in *Goetz II*, which seems to have disposed of the issues on the government's now-moribund *res judicata* defense. Having fully considered the factual and legal issues raised by petitioner's constitutional claims, there is no conceivable reason that the Tenth Circuit should not be required to reconsider its views now that they have been so thoroughly repudiated in *United Foods*.

Finally, even assuming *arguendo* the basic applicability of the presentation-on-appeal requirement to a petition seeking only a GVR, this case plainly fits within the exceptions to that general rule. *Wood* v. *Georgia*, 450 U.S. 261, 265 n. 5 (1981) (even where issue not raised in the court of appeals, case was remanded for consideration of that issue "in the interests of justice," *citing* 28 U.S.C. § 2106); *Connor* v. *Finch*, 431 U.S. 407, 421 n. 19 (1977) ("Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'") (citation omitted).

II. THIS CASE SHOULD BE REEVALUATED BY THE TENTH CIRCUIT IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED FOODS*.

The government makes no attempt to deny that the result below and in *Goetz I* hinges entirely on arguments now repudiated in *United Foods*. Instead the government claims that

petitioner is not entitled to any reconsideration in light of *United Foods* because he was merely a collecting person as to the assessments of others, and did not sell cattle or fail to pay assessments of his own. BIO 8-9. Once again the government's argument consists of nothing but fabrication regarding the facts and misconception regarding the law.

Starting with the fabrication, it is simply not true that petitioner sold no cattle. Had the government merely read the opinions below, it would have seen that petitioner is being assessed and fined for cattle he *sold as a producer* in addition to the assessments and fines on him as a collecting person.[2]

Turning to the government's legal misperceptions, even as to the assessments and fees against petitioner in his capacity as a collecting person, he plainly has standing to raise his constitutional claims. First, both the buyer and seller in a cattle transaction (the collecting person and the producer) are jointly liable for beef checkoff assessments and thus have equivalent grounds for objecting to such assessments. *See, e.g.*, App. A13 ("both the buyer and seller in private treaty sales are responsible for the unpaid checkoffs"). The very fact that petitioner is the one who will have to pay the government if he loses this case plainly establishes his financial injury and his standing to sue over unconstitutional exaction of those funds from him. The fact that the law nominally places the expense on the producer is no support for the government given that in bilateral transactions such as cattle sales, the ultimate economic burden of the checkoff will vary

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[2] *See, e.g.*, App. A3-A4 (third issue raised is whether the district court erred "in affirming the Judicial Officer's decision that Goetz is liable for past due assessments, late payment charges, and civil penalties on cattle which Goetz sold at sales barns"); *id.* A8-A9 (rejecting exemption from "producer status" for cattle sold at sales barns); *id.* C4 ("Plaintiff is a 'producer' * * * subject to the one dollar per head assessment upon the sale of cattle."); *id.* at D2 (describing government complaint that Goetz failed "to remit the assessments due for the purchase *and sale* of cattle") (emphasis added); *id.* D57 (discussing sales made by Goetz); *id.* F8, F13-14 (same).

over time and circumstance, resting upon the buyer, the seller, or both, depending upon market circumstances and momentary bargaining position. *Cf.* App. C15 (noting Goetz's argument that the Beef Act "burdens producers, importers and persons who must collect the tax (buyers of beef)"). But under all circumstances, the checkoff is an added transaction cost to the cattle sale and both parties to the transaction have standing to claim injury from that added cost, even if the constitutional right asserted is nominally derivative from a third party. *See, e.g.*, *Barrows* v. *Jackson*, 346 U.S. 249, 257-59 (1953) (white sellers had standing to raise Fourteenth Amendment rights of prospective black buyers in restrictive covenant case); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446 (1972) (contraceptives distributor had standing to raise constitutional rights of prospective unmarried buyers).

Second, even as to the collecting-person elements of the decisions below, the government's new argument was neither raised nor relied upon in any of the courts or agency venues. Because it was not the basis of the government's victory below, it would be particularly inappropriate for this Court to decide the issue in the first instance. Rather, if the government believes that the portion of assessments and fines levied against petitioner as a collecting person are not subject to constitutional defense, it can present that new claim to the Tenth Circuit on remand and that court can then decide whether the argument is permissible or meritorious. This Court, however, is not being asked to reach the merits of this case. The only question is whether the new decision in *United Foods* might have changed the result below. There is no question that *United Foods* guts the Tenth Circuit's basis for rejecting Goetz's constitutional claims. Whether other defenses might lead to the same result remains to be decided.

Third, aside from the direct monetary exaction the government seeks from petitioner, he also has constitutional injury and standing even as a collecting person due to the non-monetary compelled support for speech arising from the

Beef Act. The Act's designation of petitioner as a collecting person for some of his transactions imposes on petitioner the significant administrative and labor burden of collection, remittance, and record keeping, as a number of the enforcement counts in this case amply demonstrate. For First Amendment purposes, compelled support for speech is unconstitutional regardless of whether that support comes in the form of forced financial contributions or forced labor. *Cf. Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977) (First Amendment violated where individuals forced to carry State motto on automobile license plate, even though presence of motto was costless). Indeed, it may well be *more* offensive to the First Amendment to compel a person to labor in support of speech with which he disagrees, and hence the result in *United Foods* would *ipso facto* drive the result in the compelled labor circumstance. But in any event, compelled labor and payments are at least equivalent for present purposes given that they are economically fungible.[3]

Overall, the attempt to cast doubt on Goetz's standing to raise constitutional claims that have already been litigated on the merits is frivolous. The government readily litigated the issue against Goetz and then relied on the results of that litigation to claim a split with the Sixth Circuit in *United Foods*. With the government's position on the merits now gutted, it should not be heard to say that Goetz cannot revisit the issue because he supposedly suffers no constitutional burden.

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[3] Surely the government could not evade *United Foods* by requiring that producers donate several hours a week of their time to the checkoff program (perhaps sweeping the floors or doing the filing) in order to make up for the money the program would have received in unconstitutional assessments. Yet that is precisely what the government suggests when it claims that the compelled labor of a collecting person – substituting for tasks that would otherwise have to be performed by the checkoff program itself – does not give rise to a claim under *United Foods*.

III. THE BEEF ACT IS MATERIALLY INDISTINGUISHABLE FROM THE MUSHROOM ACT AND CANNOT SURVIVE A FIRST AMENDMENT CHALLENGE UNDER THE STANDARDS ARTICULATED IN *UNITED FOODS*.

The government's final tactic is to argue the substance of its constitutional position and the supposed limits of *United Foods*. Aside from such arguments being better left to the court of appeals they are also meritless and misleading.

For example, the government notes that *United Foods* addressed only the Mushroom Act, and not the checkoffs for other commodities. BIO 7. While true, that is why petitioner is simply asking for a GVR, rather than a summary reversal. What the government does not – and cannot – deny is that the *United Foods* decision is relevant to the consideration of other checkoff programs, and that it completely rejected the underlying *reasoning* of the decision in *Goetz I*. The final application of *United Foods* as a precedent in the context of the Beef Act is precisely the point of a GVR to the Tenth Circuit. *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (GVR indicates that an intervening case is "sufficiently analogous and, perhaps, decisive to compel re-examination" of pending case). The government will be hard-pressed before the Tenth Circuit to repudiate its repeated representation before this Court that the Mushroom Act and the Beef Act are materially indistinguishable for First Amendment purposes.[4]

Next the government argues that *United Foods* did not decide whether the Mushroom Act (and, by extension, the Beef Act) would survive under a commercial speech analysis. BIO 7. While literally true, that argument is misleading given that this Court did not address commercial speech standards

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[4] The government's passing commentary that other commodities "may be regulated differently in other respects" simply ignores the fact that the only pertinent regulation of beef, the Packers and Stockyards Act, is designed to *enhance* competition and thus makes this an even *stronger* case for striking down the assessments than was *United Foods*.

because it had previously held, and the government in *United Foods* had recognized, that such standards did not apply to checkoff challenges. *See* Reply Br. for the Petitioners, *United Foods*, No. 00-276 (Apr. 9, 2001) at 9-10 n. 7 (Supreme Court has "made clear in *Wileman* that 'the *Central Hudson* test, which involved a restriction on commercial speech, should [not] govern a case involving the compelled funding of speech'"; concluding that the inapplicability of *Central Hudson* has now "been resolved") (*quoting Glickman* v. *Wileman Brothers & Elliot, Inc.*, 521 U.S. 457, 474 n. 18 (1997)) (brackets in brief). Furthermore, this Court in *United Foods* assumed that the speech in question was commercial speech and found that irrelevant, holding that "even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *United States* v. *United Foods, Inc.*, -- U.S. --, --, 121 S. Ct. 2334, 2337 (2001). The notion that a defense of the Beef Act under commercial-speech standards remains viable is thus frivolous.

The government also suggests that it could defend the program as government speech, which was explicitly left unresolved in *United Foods*. BIO 7. Aside from that argument best being left to the Tenth Circuit in the first instance, the government neglects to mention that the only court of appeals to reach the government speech argument has expressly rejected it as applied to the Beef Act. *See United States* v. *Frame*, 885 F.2d 1119, 1132 (CA3 1989), *cert. denied*, 493 U.S. 1094 (1990). Indeed, in *United Foods*, the government seemingly endorsed the view in *Frame* that the Beef Act "'was structured as a "self-help" measure that would enable the beef industry to employ its own resources and devise its own strategies'" Brief for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Jan. 24, 2001), at 24 (*quoting Frame*, 885 F.2d at 1122). That view of the Beef Act as a "self-help" measure is flatly inconsistent with the government's revisionist position on government speech.

Finally, the government suggests that it could defend the Beef Act under strict scrutiny. BIO 7-8. Wishful thinking aside, that argument somewhat begs the question of the nature of scrutiny applied in *United Foods*. If it was strict scrutiny, then the government's answer is simply wrong. If it was less than strict scrutiny – which petitioner believes it was – then having failed the more lenient standard in *United Foods* the government would *ipso facto* fail any stricter standard.

Overall, however much the government tries to raise doubts on the merits, it singularly fails to rebut the central issue for a GVR – whether the intervening case from this Court might change the outcome of the case pending on petition. In this case, there is simply no doubt as to the relevance of *United Foods* to petitioner's claims.

IV. VACATUR AND REMAND SERVE THE EQUITIES OF THE CASE AND FURTHER THE ORDERLY AND EFFICIENT ADMINISTRATION OF JUSTICE

It would be a great injustice if petitioner were forced to pay the government an unconstitutional assessment after his position finally has been vindicated by this Court. It would be especially disturbing given that it was petitioner's very own case seeking to halt this collection action that the government relied upon as the split that brought *United Foods* to this Court in the first place. This case, while in the eleventh hour, is not yet final, is fully amenable to a GVR, and petitioner should be allowed to argue based upon *United Foods* the newly vindicated position that he has maintained all along. The alternative is to allow the government to go forward and collect unconstitutional assessments based on a decision the reasoning of which this Court has rejected in almost every conceivable detail. The interests of justice, the credibility of the judicial system, the avoidance of new litigation to seek a refund, and the equities surrounding petitioner's late-vindicated struggle strongly favor a GVR.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and vacate and remand to the Tenth Circuit for reconsideration in light of *United Foods*.

Respectfully submitted,

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